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A TREATISE

ON THE

SPECIFIC

PERFORMANCE OF CONTRACTS

BY

THE HON. SIR EDWARD FRY,

One of the Judges of the High Court of Justice, B. A., and Fellow of University College, London.

THE SECOND EDITION

BY

THE AUTHOR AND WM. DONALDSON RAWLINS,

Of Lincoln's Inn, Esq., Barrister-at-Law, M. A., and late Fellow of Trinity College, Cambridge.

THIRD AMERICAN EDITION,

WITH REFERENCES TO THE LATEST AMERICAN CASES

BY

WILLIAM M. SCOTT,

Of the Albany County Bar.

"Not what thou and I have promised to each other, but what the balance of our forces can make us perform to each other that, in so sinful a world as ours, is the thing to be counted on."

CARLYLE: "French Revolution," Vol. II, Book I, Chap. 7.

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PREFACE

TO THE THIRD AMERICAN EDITION

THE last edition of "Fry's Specific Performance of Contracts," was that of William S. Schuyler, Esq., Counselor at Law; it has been out of print for sometime, having been published in 1871. The want of a new edition has been felt by the profession, in England, as in this country, and as a result we have an English edition bringing the cases down to the year 1882.

The editor of the third American edition is responsible for the notes from the year 1871, to the present time; if the notes which he has added have not essentially improved the value of the original work, they will not prevent that from becoming to the American lawyer what the best reviewers in England have pronounced to be a work in which "the law upon the subject it treated of, was accurately digested, and carefully stated; and for completeness and soundness likely to become the text book upon the law of Specific Performance of Contracts."

The contents, and index, have been carefully revised, and caused to correspond with the pages of the third American edition.

W. M. S.

PREFACE

TO THE SECOND EDITION

More than twenty years have passed away since I first wrote and published the following treatise: and in that space of time great changes have been effected in the law—and a great volume of decisions bearing on the subject of this essay has been pronounced.

I must expect a severer criticism for this second edition than that with which the first edition was received: but I am sure that the kindness which I have always received from the members of my profession will not fail me now.

There is one notion often expressed with regard to works written or revised by authors on the Bench, which seems to me in part at least erroneous, the notion I mean that they possess a quasi-judicial authority. It is hardly enough remembered how different are the circumstances under which a book is written and a judgment pronounced, or how much the weight and value of the latter are due to the discussions at the bar which precede the judgment.

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I have revised or rewritten or written the following parts of the present volume, viz. :

PART I.—The whole.
" II.—The whole, except part of Chapter II.
" III.—The whole, except Chapter XXV.
" V.—Chapter V.
" VI.—The whole, except Chapter IX.

The XIth Chapter of Part III. (that on the Statute of Frauds) was originally revised for me by another hand and may retain some traces of a difference of style : and in other parts I received some assistance from my former pupil and friend, the late Mr. H. W. May. By far the greater part of this work of revision and rewriting was done by me before leaving the bar. These parts of the work have been subsequently revised and brought down to date by the labors of Mr. Rawlins.

The revision of the other parts of the volume, namely :—

PART II.—Part of Chapter II.
" III.—Chapter XXV.
" IV.—The whole.
" V.—The whole, except Chapter V.
" VI.—Chapter IX.

has been undertaken by Mr. Rawlins alone. He has consulted me on various points which have arisen, especially on the general arrangement of some of the chapters ; but the whole merit of this work is his.

To him also is due the entirely new Index, which will, I hope and believe, be found a valuable part of the book.

My thanks are due to Professor Holland, of Oxford, for kind assistance, the nature of which will be learned from the additional note at the end of the volume.

E. F.

Lincoln's Inn, *May*, 1881.

PREFACE

TO THE FIRST EDITION.

The following papers contain an attempt to enquire into the principles which govern Courts of Equity in the Specific Performance of Contracts. I offer this little book to the members of my profession, with somewhat of hope, because I know the indulgence with which they are wont to accept the results of honest labor spent on professional subjects: but with much more of diffidence, because I am not ignorant of the difficulties of the subject on which I have written, or the shortcomings of my own performance.

The scope and object of my essay will be sufficiently learned from the table of contents. It will at once be seen that they are essentially different from those of the admirable works of Lord St. Leonards and Mr. Dart on the Law of Vendors and Purchasers. Those treatises discuss the contract of sale of real estate and all the relations thence arising, so that the doctrine of specific performance is treated of only as one mode in which that contract is enforced: whilst the present work is designed to elucidate the principles of specific performance in general, and the

contract of sale only so far as it requires attention as one of the contracts which the court enforces. If the object of those learned treatises had not been thus distinct from that of the following pages, I should never have thought of committing them to the press.

The connection of the different branches of law is, like the connection of the sciences, so close as often to embarrass the writer who attempts to treat of one subject by itself. I have found this difficulty continually recurring, as I have been engaged in composing this book, because it is by no means easy to decide how much of the law on many questions ought to find place in a treatise on the principles and practice of the courts in specific performance, and how much ought to be referred to a discussion of the particular species of contract to which the point may relate. I have endeavored on each occasion to solve this question with a view to the practical utility of the following pages, and to what I suppose a lawyer would reasonably expect to find in a treatise bearing the title of this volume.

Several important decisions on the subject of specific performance have appeared during the progress of these pages through the press, which I have found it impracticable to embody in the text: some of these cases have been referred to in the notes, and others only in the table of addenda, to which the reader is referred.

My friend Mr. J. P. Green, of the Middle Temple, has obligingly read the proof-sheets of this book: I gratefully acknowledge his kindness in so doing.

E. F.

5, New Square, Lincoln's Inn, 24th *May*, 1858.

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NOTE.

The following editions are referred to:

Austin's Lectures on Jurisprudence, 3d edition.
Daniell's Chancery Practice, 5th edition.
Dart's Vendors and Purchasers, 5th edition.
Fonblanque's Treatise of Equity, 5th edition.
Maddock's Chancery Practice, 2d edition.
Seton's Decrees (cited as "Seton"), 4th edition.
Stephen's Pleading, 4th edition.
Story's Conflict of Laws, 2d edition.
Sugden's Vendors and Purchasers (cited as "St. Leon. Vend."), 13th edition.

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THE SPECIFIC PERFORMANCE OF CONTRACTS.

PART I.

OF THE JURISDICTION.

CHAPTER I.

OF THE ORIGIN AND GENERAL CHARACTER OF THE JURISDICTION.

§ 1. "A CONTRACT," says the author of *The Mirror*, "is a speech betwixt parties that a thing which is not done be done."(*a*) "A contract," says Sir William Blackstone with greater exactitude, is "an agreement upon sufficient consideration to do or not to do a particular thing."(*b*) "In order to constitute an agreement or contract," said Kindersley, V. C., "two things are requisite—*firstly*, the will; and *secondly*, some act, whether in word or deed, whereby that will is communicated to the other party.[1] No man has entered into an agreement or contract to do, or not to do, some particular thing unless he has willed that the thing should be done or forborne; and also has communicated that will to the other party by some act engaging to carry it into effect; when both parties will the same thing, and each communicates his will to the other, with a mutual engagement to carry it into effect, then (and not till then) an agreement or contract between the two is constituted."(*c*)

(*a*) Ch. 2, § 27.
(*b*) 2 Bla. Com., 442. For other definitions see Holland's Jurisprudence, 173; Pollock on Contracts, ch. 1; and per Stephen, J., in Alderson v. Maddison, 5 Ex. D., 297.
(*c*) Haynes v. Haynes, 1 Dr. & Sm., 433.

[1] *Definition, as applied to contracts.*] "The actual accomplishment of a contract by the party bound to fulfill it." Bouv. L. Dic. "Performance of contract in the precise terms agreed upon; strict performance." Bouv. L. Dic., under "Specific performance."

§ **2**. This treatise being devoted to a discussion not of contracts in general but of one particular method of giving relief in respect of them, it is not proposed here to enter into the numerous points which arise upon the above definitions. Many of the points which would require attention in such a discussion will be found treated of under the head of the defenses which may be raised to an action for specific performance. That mode of treatment, if less logical, is, it is conceived, more practically useful for the purposes of this treatise than entering upon a general discussion of the nature of contracts.

§ **3**. The specific performance of a contract is its actual execution according to its stipulations and terms; and is contrasted with damages or compensation for the non-execution of the contract. Such actual execution is enforced under the equitable jurisdiction vested in the courts of this country by directing the party in default to do the very thing which he contracted to do, and, in the event of his disobedience, by treating such disobedience as a contempt of court and visiting it with all the consequences of such contempt, including committal to prison;(*d*) and in some cases by doing in one way the thing which the defaulter was directed to do in another way, as, *e. g.*, by vesting by an order of the court an estate which ought to have been vested by conveyance of the party.(*e*)

§ **4**. From every contract there immediately and directly results an obligation on each of the contracting parties towards the other of them to perform such of the terms of the contract as he has undertaken to perform. And if the person on whom this obligation rests fail to discharge it, there results in morality to the other party a right at his election either to insist on the actual performance of the contract or to obtain satisfaction for the non-performance of it.(*f*)

§ **5**. When we consider how large a part in the affairs of modern society is played by contracts and the resulting rights and obligations, and how plainly the right to insist on the actual execution of contracts flows from their very nature, it is at first sight a remarkable circumstance that no

(*d*) Seton, 1328, 1563, et seq.
(*e*) See infra, § 1151.
(*f*) Austin's Jurisprudence (3d ed.), 65.

system of jurisprudence, except that administered by the courts of equity in England and its past or present colonies, has ever attempted directly to enforce the actual performance of contracts in their very terms. And yet such is, it is believed, the case.(*g*)

§ **6**. It is certain that the Roman law gave a title to damages as the sole right resulting from default in performance, and did not enforce specific performance directly or in any other manner than by giving such right to damages. It held to the maxim, "*Nemo potest præcise cogi ad factum.*"(*h*)

§ **7**. In like manner the common law of England made no attempt actually to enforce the performance of contracts, but gave to the injured party only the right to satisfaction for non-performance.

§ **8**. Perhaps it is to the recent growth in most societies of contract as compared with status, custom, and imperative law that the want in question is to be referred. Sir Henry S. Maine has shown, in his work on Ancient Law,(*i*) how slow was the introduction into jurisprudence of any provision for the enforcement of contracts, and how that introduction was due to the increase of commercial activity. The same spirit of commerce which led to the enforcement of contracts, also brought in the notion that money is an equivalent of everything—is an universal common measure; and this, coupled with the simplicity of early contracts and the difficulty attendant on the specific performance of complicated ones, probably led to the arrested growth of the remedies for their breach and the confining of such remedies for the most part to the payment of money or the delivery of a chattel.

§ **9**. There were, it appears, ancient systems of law which refused all assistance to the enforcement of contracts on the ground that they ought only to be entered into with those whose honor could be trusted; such was, it is said, the principle adopted by Charondas and the ancient Indians.(*j*)

§ **10**. Though the courts of common law never enforced the specific performance of contracts, there were certain

(*g*) See further Infra, 669.

(*h*) See Pothier, Tr. des Oblig., pt. I, ch. 2, art, 2, § 2.

(*i*) Ch. 9. In ancient Egypt and Assyria contracts seem to have played a very important part. (See for the former 1 Wilkinson's Ancient Egyptians, 312 et seq. [ed. 1878]; and for the latter The Assyrian Private Contract Tablets, translated by the Rev. A. H. Sayce, in 1 Records of the Past, 137 et seq.) In the view of comparative history, Egypt and Assyria both reached the stage of modern history at a very early period of the world's life.

(*j*) Holland, Jurisp., 174.

cases in which they made near approaches to it, and these it will be well briefly to consider. They were cases:

(1) Where a public duty arose from a private contract.

(2) Where the contract was for the delivery of a chattel.

(3) Where the contract was for the payment of a sum of money.

(4) Arising on covenants real.

§ **11**. (1) The object of the prerogative writ of mandamus is the enforcing of public duties. Before the judicature acts,(*k*) if A. had by the deed of settlement of a company, entered into a contract with that company, or with trustees for it, or with his fellow shareholders, that a company should be formed and conducted in a specified manner, including, for instance, provisions for the registration of transfers of shares, and if this deed of settlement had been confirmed by royal charter and the company had made default in registering a transfer, whereby A. was injured, in such a case the prerogative writ of mandamus would have lain in the Court of Queen's Bench, and the public duty of the company which resulted from the contract contained in the deed of settlement would have been enforced at the suit of A.(*l*) Here the contract would not have been specifically enforced; but a public duty flowing in part from the contract would have been performed.

§ **12**. In addition to the old prerogative writ of mandamus, there is a statutory writ under the 68th section of the common law procedure act, 1854, which provides for the issue of "a writ of mandamus compelling the defendant to fulfill any duty in the fulfillment of which the plaintiff is personally interested." It was naturally suggested that this power authorized the courts of common law to grant specific performance of contracts by means of the statutory writ; but in the case of Benson v. Paull,(*m*) the Court of Queen's Bench declined specifically to enforce a contract for a lease, and determined that the provision of the act did not apply to the duty arising from a personal contract. To this opinion the same court adhered in the subsequent case of Norris v. The Irish Land Co.,(*n*) and it was regarded as settled that

(*k*) See now Jud. Act, 1873, § 25 (8); Re Paris Skating Rink Co., 6 Ch. D., 731.

(*l*) Norris v. Irish Land Co., 8 El. & Bl., 512.

(*m*) 6 El. & Bl., 273.

(*n*) 8 El. & Bl., 512.

the courts of common law could not by means of the writ of mandamus enforce the actual execution of contracts which resulted in private rights only and not in duties in which the public were interested.

§ **13**. (2) Before the passing of the common law procedure act, 1854, it was a matter of question whether in detinue the delivery of the specific chattel could be obtained if the defendant chose to pay the damages assessed instead of delivering up the chattel; but all such doubts are removed by the 78th section of that act, which provides that "the court or a judge shall have power, if they or he see fit so to do, upon the application of the plaintiff in any action for the detention of any chattel, to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed."(*o*)

§ **14**. If a contract were entered into between A. and B. for the delivery by B. of a certain chattel on payment of a certain sum by A., and A. made the payment but B. refused to deliver the chattel, an action for its detention would lie in a court of common law at the suit of A., and at his election execution might issue for the return of the chattel. This looks very like a specific performance of the contract, but was not such in fact. The complaint of A., in the case supposed, was not that the contract had been broken, but that the chattel had been detained. He did not aver that the contract ought to be performed and that the chattel ought to be made his; but he alleged that the contract had been performed, and that therefore the chattel was his, and the defendant's detention wrongful. In short, the contract came into controversy, if at all, only as the title of the plaintiff.

§ **15**. (3) Lord Mansfield, C. J., has remarked that "pecuniary damages upon a contract for payment of money are, from the nature of the thing, a specific performance."(*p*) But the remark seems hardly strictly accurate. No doubt the sum agreed to be paid will be the measure of damages, and the amount paid will be the same whether the contract be performed or broken. But in the former case the money

(*o*) Cf. Ord. LII, r. 6.

(*p*) In Johnson v. Bland, 2 Burr., 1086.

is paid in performance of the contract; in the latter case it is paid as satisfaction for its non-performance. It is evident that the consequences of the two payments would, therefore, be different.

§ **16**. (4) According to the old common law, a covenant by A. to convey lands to B. (which was called a covenant real) could be enforced by a special writ of covenant, which was in the nature of a specific performance of that covenant. The writ was to the sheriff to command A. that he keep his covenant with B.; and the relief for non-performance was not in damages but by means of a *præcipe quod reddat* of the land in question. This writ of covenant was the commencement of proceedings in fines before their abolition.(*q*)

§ **17**. In one case the ecclesiastical courts exercised a jurisdiction in the nature of specific performance. When man and woman had entered into a marriage contract *per verba de præsenti*, one refusing might be sentenced by the ecclesiastical court to celebrate the marriage *in facie ecclesiæ* accordingly, and for refusal to obey might be excommunicated and imprisoned on a writ *de excommunicato capiendo* until he or she submitted to obey the ordinary; and a like jurisdiction was exercised in the case of contracts *per verba de futuro*, though the process for contumacy was in certain cases different.(*r*) But by the statute 26 Geo. II, ch. 33, s. 13, and afterwards by statute 4 Geo. IV, ch. 76, s. 27, this jurisdiction of the ecclesiastical courts was abolished.

§ **18**. From what has been already said, it appears that the origin of this branch of equitable jurisdiction is not to be sought in the Roman law.[1] Perhaps it is rather to be found in the ecclesiastical or canon law, which seems to have recognized the obligation of actual performance of the terms of the contract. The decretals of Gregory, under the title *De Pactis*, contain a chapter, headed "*Judex debet studiose agere ut promissa adimpleantur*," in which it is laid down, "*Studiose agendum est ut ea quæ promittuntur*

(*q*) Fitzh. Natura Brevium, "Covenant to Levy a Fine;" 3 Bla. Com., 156.

(*r*) 2 Burn's Eccl. Law (1st ed.), Marriage, ch. 2, p. 5. In the Maid of Honor Massinger makes his heroine sue to the king for the specific performance of a written contract to marry her.

[1] *Rule where contract is executed.*] The specific performance of contract may be refused by a court of equity, which it would not set aside if executed. Jackson v. Ashton, 11 Peters, 229; Clitherall v. Ogilvie, 1 Dessans Eq., 250; Barksdale v. Payne, Riley S. C. Ch., 174; Seymour v. Delancey, 3 Com., 445.

opere compleantur."(*s*) Chaucer, too, in the commencement of the Friar's Tale, describing the jurisdiction exercised by an archdeacon, enumerates contracts as one of the matters which were subject to his cognizance.

"Whilom there was dwellyng in my countré
An erchedeken, a man of gret degré,
That boldely did execucioun,
In punyschyng of fornicacioun,
Of wicchecraft, and eek of bauderye,
Of diffamacioun, and avoutrie,
Of chirche-reves, and of testamentes,
Of contractes, and of lak of sacraments,
And eek of many another maner cryme,
Which needith not to reherse at this tyme."

On such a point as this the authority of Chaucer appears entitled to much weight. He is said to have been bred to the law; and it is certain that parts of his tales exhibit an acquaintance even with the forms of law; as, for instance, the Doctor's Tale, where the "pitous bill" presented to Appius by Claudius (v. 178 et seq.) forcibly recalls the form of a bill of complaint in the court of chancery. But perhaps this inquiry into the origin of the jurisdiction is needless. It may have had its source, not in some pre-existing system of jurisprudence, but in the plain principles of morality and the common sense of the judges who founded and enlarged the equitable jurisdiction of the court of chancery.

§ **19**. The earliest trace of this jurisdiction in specific performance which the industry of legal antiquaries has discovered appears to be a case in the reign of Richard II, and to have related to the sale of land.(*t*) In a case in the Year Book of 8 Edw. IV,(*u*) the jurisdiction is fully recognized. The case arose on a promise to indemnify the plaintiff, and the Lord Chancellor laid down that there was remedy in chancery where the plaintiff was damaged by the non-performance of a promise; and Genny, J., said that if I promise you to build you a house and do not do it, you may have remedy by subpœna. In the reign of Henry VI, cases are recorded in which the jurisdiction was involved. In the

(*s*) Decret. Greg. 9, lib. 1, tit. 35, cap. 3.
(*t*) 1 Spence, Eq. Jur., 645. See, also, 2 Powell, Contr., 4 et seq.
(*u*) Page 4, b. The language of Genney, J., is "*faire a vous un meason.*" Query, should not this be rendered "to make over to you a house?" The text-books all seem to render it "to build."

21 Henry VII,(*v*) a case occurs where Fineux, C. J., in discussing the extent of the action on the case observed, that if one bargains with me that I shall have his land to me and my heirs for £20, and that he will make the estate over to me and I pay the £20, but he will not make over the estate to me according to the covenant, I may have an action on the case and am not bound to sue out a subpœna.(*w*) Brooke, in his Abridgement,(*x*) after saying that in the case stated an action on the case would lie, adds significantly: "But note that by this he will get nothing but damages, but by subpœna the Chancellor can compel him to convey the estate or imprison him *ut dicitur*."

§ **20**. The reign of Elizabeth, and the early part of the reign of the first James, afford other instances of the exercise of the jurisdiction.(*y*) But it did not establish itself without great jealousy on the part of the common law courts, of which a curious illustration is to be found in the case of Bromage v. Gennings,(*z*) in the 14 James I. Bromage sued Gennings in the Court of the Marches of Wales for not executing a lease according to his bargain, and from the statement of the plaintiff's counsel it appears to have been a suit for specific performance and not to recover damages, and this, he added, is usually done in chancery. Thereupon the defendant moved for a prohibition and obtained it, Coke, Doddridge, and Haughton saying that chancery ought not to do so, for then to what purpose are the actions on the case and covenant; and Coke added that this would subvert the interest of the covenantor who understands that it is at his election either to lose the damages, or to make the lease. Doddridge observed that if a decree was made for the execution of the lease, and he did not choose to execute it, there would be no other remedy than imprisonment. So complete was the unanimity of feeling in the court that Serjeant Harris, the respondent's counsel, said that the part he took in the matter was against his conscience.

Nevertheless, from this time forward, the jurisdiction appears to have been well established and in frequent exercise.

(*v*) 1 Spence, Eq. Jur., 645; C. P. Cooper, Appx., 381.
(*w*) Page 41, a.
(*x*) Action sur le case, pl. 72.
(*y*) 1 Spence, Eq. Jur., 645.
(*z*) Rolle Rep., 354, 368. See, too, infra, 670.

§ **21**. Before proceeding further, it will be well to distinguish the jurisdiction usually described as that in specific performance from some kindred ones formerly exercised by the court of chancery. By that expression is usually understood that peculiar, and, as it is called, extraordinary jurisdiction, which that court exercised in respect of executory contracts as contrasted with executed contracts. An executory contract is one which is not intended between the parties to be the final instrument regulating their relations; an executed contract is one which is intended to be thus final.(*a*) The difference may be illustrated by the contrast between an agreement (say on the dissolution of a partnership), to execute a deed containing certain covenants, and the deed itself containing these covenants. The agreement is an executory contract; the deed is an executed contract. An action founded on the agreement would be strictly an action for specific performance; an action founded on the deed would not be so described, and it could have been entertained by the court of chancery only on the ground that an injunction or an account was prayed for, or that some independent jurisdiction of the court was invoked. It could not have been supported on the ground of specific performance as ordinarily used.

§ **22**. Actions for specific performance of executory contracts differ from actions for the performance of trusts. For contracts are for the most part contained in legal instruments which give rise to legal rights; and specific performance is therefore only an alternative remedy in lieu of damages. On the contrary, trusts are constituted by instruments which are of equitable force only so far as the trust is concerned, in respect of which therefore before the judicature acts a suit in equity was the only mode of relief.

§ **23**. From actions for specific performance we must further distinguish actions for the delivery of a chattel in specie. This may be a mode of specific performance when the right to the chattel flows from a contract.[1] But the

(*a*) Per Lord Selborne in Wolverhampton and Walsall Railway Co. v. London and Northwestern Railway Co., L. R. 16 Eq., 439. See, also, 1 Powell, Contr., 235; and infra § 822.

[1] *Several articles purchased.*] Specific performance will be decreed as to all, where the plaintiff can only be compensated in damages for some of several articles purchased by him. McGowin v. Remington, 12 Pa. St., 56.

court of chancery had (as we shall see [*b*]) an independent jurisdiction to decree the delivery up of unique articles, whether the right to them resulted from contract or not.

§ **24**. Again, from actions for specific performance we must distinguish those cases in which, by reason of fraud or the breach of some fiduciary relationship, a constructive trust arises. Cases sometimes of a mixed nature have arisen; as, for instance, when by a contract to give up part of an estate if purchased, A. persuaded B. not to compete with him as a purchaser. On A.'s refusal to abide by his contract, B. might have sued him, alleging at once the contract and the breach of A.'s duty as agent.(*c*)

We shall hereafter see (*d*) that the peculiar doctrines of the court as to the specific performance of executory contracts do not necessarily apply to the other forms in which the court grants specific relief.

§ **25**. There is an observation often made with regard to the jurisdiction in specific performance which remains to be noticed. It is said to be in the discretion of the court.[1] The meaning of this proposition is not that the court may arbitrarily or capriciously perform one contract and refuse to perform another; but that the court has regard to the conduct of the plaintiff and to circumstances outside the contract itself, and that the mere fact of the existence of a valid contract is not conclusive in the plaintiff's favor.(*e*) "If the defendant," said Plumer, V. C., "can show any circumstances *dehors*, independent of the writing, making it in-

(*b*) Infra, § 57.
(*c*) See Chattock v. Muller, 8 Ch. D., 177, 181.
(*d*) Infra, § 822 et seq.
(*e*) Lamare v. Dixon, L. R. 6 H. L., 414.

[1] Neither party to a contract is entitled to a decree for specific performance as a matter of right, the granting or withholding such relief is always in the sound discretion of the court: this is the rule as laid down by all the authorities, and sustained in a long chain of decisions. Pyrke v. Waddington, 10 Hare, 1; Cox v. Maddleton, 2 Drew, 209; Bennett v. Smith, 16 Jur., 422; Watson v. Marston, 4 De G. M. & G., 230; Waters v. Howard, 1 Md. Ch., 112; Blackmilder v. Loveless, 21 Ala., 371; Hudson v. Layton, 5 Harring., 74; Young v. Daniels, 2 Iowa, 126; Rudolph v. Covell, 5 id., 126; Anter v. Miller, 18 id., 405; Waters v. Howard, 8 Gill., 262; Smoot v. Rea, 19 Md., 398; Hester v. Hooker, 7 Sm. & Marsh, 768; Tobey v. County of Bristol, 3 Story, 800; Pickering v. Pickering, 38 N. H., 400; Humbard v. Humbard, 3 Head (Tenn.), 100; Scott v. Whiltour, 20 Ill., 316; Doyle v. Harris, 11 R. I., 539. Where the vendor refused to fulfill, as required by the terms of the contract: Held, by the Court of Appeals in New York, that the right to maintain a suit for specific performance was perfect. Peters v. Delaplaine, 49 N. Y., 362; see McComas v. Easley, 21 Gratt., 23; Hale v. Wilkinson, 21 id., 75; Beach v. Dyer, 93 Ill., 295.

equitable to interpose for the purpose of a specific performance, a court of equity, having satisfactory information upon that subject, will not interpose."(*f*) But of these circumstances the court judges by settled and fixed rules; hence the discretion is said to be not arbitrary or capricious, but judicial;(*g*) hence, also, if the contract has been entered into by a competent party, and is unobjectionable in its nature and circumstances, specific performance is as much a matter of course and therefore of right as are damages.(*h*) The mere hardship of the results will not affect the discretion of the court.[1](*i*)

(*f*) In Clowes v. Higginson, 1 V. & B., 527.
(*g*) Goring v. Nash, 3 Atk., 186; White v. Damon, 7 Ves., 30, 35; Buckle v. Mitchell, 18 id., 100, 111; Revell v. Hussey, 2 Ball & B., 288.
(*h*) Hall v. Warren, 9 Ves., 605, 608.
(*i*) Haywood v. Cope, 25 Beav., 140, where Lord Romilly, M. R., fully discusses the nature of the discretion in specific performance.

[1] *Rule as to specific performance.*] It is as much a matter of course for a court of equity, sitting as such, to decree the specific performance of a contract, as for a court of law to give damages for the breach of it, where the matter concerns real estate, is valid, unobjectionable in its nature, and in the circumstances connected with it: it must, however, be capable of being enforced. Hall v. Warren, 9 Ves., 608; Haywood v. Cope, 25 Bow., 140; Rogers v. Saunders, 16 Me., 92; Griffith v. Frederick Co. B'k, 6 Gill & John., 424; Pigg v. Corder, 12 Leigh., 69; Meeker v. Meeker, 16 Conn., 403; Seymour v. Delancey, Cow., 445; 6 Johns. Ch., 222; King v. Merford, 1 N. J. Eq., 274; Plummer v. Kepler, 26 id., 481; Anthony v. Leftwich, 3 Rand. (Va.), 238; Prater v. Miller, 3 Hawks., 629; Turner v. Clay, 3 Bibb., 52; Frisly v. Ballance, 4 Scam., 287; Broadwell v. Broadwell, 6 Ill., 599; McMurtrie v. Bennett, Harr. Chan. (Mich.), 124; Dougherty v. Hamston, 2 Black., 273; St. John v. Benedict, 6 Johns. Ch., 111; McWharter v. McMahn, 1 Clark. (N. Y.), 400; Henderson v. Hayes, 2 Watts., 148; Perkinson v. Wright, 3 Han. & Michen, 324; Leigh v. Crump, 1 Ired. Eq., 299; Gould v. Womack, 2 Ala., 83; Pulman v. Owen, 25 id., 493; Ash v. Daggy, 6 Ind., 259; Howard v. Moore, 4 Sneed., 317; Minturn v. Seymour, 4 Johns. Ch., 497; Jackson v. Ashton, 11 Peters, 229; Bowen v. Irish, 6 Bosw., 245; Lowery v. Buffington, 6 W. Va., 249: Abbott v. L'Hommedieu, 10 id., 677; Stearns v. Beckham, 31 Gratt., 379.

When judicial discretion ceases.] The relief demanded in an action for the specific performance of a contract lies in the discretion of the court, only so far as it must necessarily judge whether, under the circumstances, the agreement is, or is not, an inequitable one. When that fact is determined, judicial discretion ceases. Goodwin v. Collins, 4 Houst. (Del.), 28; King v. Hamilton, 4 Pet., 310; Lee v. Kirby, 104 Mass., 420; Wedgwood v. Adams, 6 Beav., 600.

CHAPTER II.

OF THE EXTENT OF THE JURISDICTION.

§ **26**. It has already been in substance observed that if a contract be made and one party to it make default in performance, there appears to result to the other party a right at his election either to insist on the actual performance of the contract, or to obtain satisfaction for the non-performance of it.(*a*) It may be suggested that from this it follows that a perfect system of jurisprudence ought to enforce the actual performance of contracts of every kind and class, except only when there are circumstances which render such enforcement unnecessary or inexpedient, and that it ought to be assumed that every contract is specifically enforceable until the contrary be shown. But so broad a proposition has never, it is believed, been asserted by any of the judges of the court of chancery, or their successors in the high court of justice, though, if prophecy were the function of a law writer, it might be suggested that they will more and more approximate to such a rule.[1]

Judges have sometimes dwelt upon those negative circumstances which render specific performance unnecessary or inexpedient; sometimes on those affirmative circumstances which render such performance necessary and expedient.

(*a*) See supra, § 4.

[1] *Rule in respect to what contracts will be enforced.*] Every contract should be enforced, the subject of which is susceptible of substantial enjoyment; provided the circumstances surrounding and connected with the contract, bring it within the rules entitling the party to equitable relief. Bruck v. Tucker, 42 Cal., 347: Johnson v. Ricket, 5 id., 218. Where the agreement is in writing, is fair and certain, is upon an adequate consideration, and is capable of being enforced, a court of equity will decree specific performance as a matter of course. Chance v. Beall, 20 Ga., 143; Rogers v. Saunders, 16 Me., 62: Hoffer v. Hoffer, 16 N. J. Eq., 147. Wherever such interference becomes necessary to prevent the improper diversion of a specific fund devoted to a particular use, or to prevent a great and irreparable injury, or to avoid a multiplicity of actions; a court of equity has jurisdiction, and will interfere. Skinner v. Morris Canal & Banking Co., 27 N. J. Eq., 364; Farmer v. Vallentine, 3 Nebr., 498.

§ **27**. The following propositions may help to explain the extent to which the jurisdiction has hitherto gone, assuming in each proposition (unless otherwise stated or implied) the existence of a contract binding in equity. The court will interfere in specific performance :[1]

(1) Where there is no common law remedy.

(2) Where the common law remedy exists, but is not adequate.

On the contrary, the court will not interfere in specific performance :

(3) Where the common law remedy exists and is adequate.

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[1] *Equity creates no right of action.*] Notwithstanding a court of equity will supply a remedy where none exists at law, yet it will not create a right of action where the law gives none. The rule which requires a plaintiff to show a present subsisting right of action, is equally regarded in equity as at law. Hoy v. Hansbrough, 1 Freem. (Miss.) Ch., 533; see Foote v. Garland, 1 Sm. & Marsh. Ch., 95; Slanson v. Watkins, 44 N. Y. Supr. Ct., 73.

When remedy most often exercised.] Specific performance is most frequently exercised in the case of contracts concerning real estate, the remedy being applied not only as between the original parties, but also to all who claim under them. Glaze v. Drayton, 1 Desau, 109; McMorris v. Crawford, 15 Ala., 271; Ewins v. Gordon, 49 N. H., 444; Nesbit v. Moore, 9 B. Mon., 508; Tiernan v. Roland, 27 Pa. St., 429; Ambrouse v. Keller, 22 Gratt., 769; Laverty v. Moore, 33 N. Y., 658; Murphy v. McVicker, 4 McLean, 252; St. Paul Div. v. Brown, 9 Minn., 157; Varick v. Edwards, 1 Hoffm. Ch., 382; Sterling v. Klepsattle, 24 Ind., 94; Maddox v. Rowe, 23 Ga., 431; Vaughn v. Barkley, 6 Whart., 392; Harding v. Metropol. R. R., L. R., 7 Ch. 154; Eastern Counties R. R. Co. v. Hawkes, 5 House of Lords, 331; Lewis v. Lord Lechmore, 10 Med., 503; Hood v. Northwestern R. R. Co., 8 Eq., 666; aff'd, 5 Ch. App., 525.

Choice of Remedies.] Notwithstanding a vendor of real estate usually has an adequate remedy at law, yet he has a choice of remedies. Forsyth v. McCauley, 48 Ga., 402; Pinkie v. Curtiss, 4 Brown's Ch., 329; Carey v. Smith, 2 N. Y., 60: Schropell v. Hopper, 40 Barb., 425; Bryson v. Peak, 8 Ired. Eq., 310; Phyfe v. Wardell, 5 Paige Ch., 268; Springs v. Sanders, Phill. (N. C.) Eq., 67; Finley v. Aiken, 1 Grant. Pa. Cas., 83; Lanison v. Barb, 4 Watts., 27; Old Colony R. R. Co. v. Evens, 6 Gray, 25. In Deck's Appeal (57 Pa. St., 467) and Kauffman's Appeal (55 Pa. St., 383), the bill was dismissed, where the whole object of it was to obtain payment of the purchase money.

Rule in regard to personal property.] Whatever may be the nature of the property, if the plaintiff has not an adequate remedy at law, a court of equity will entertain jurisdiction. It is no ground of demurrer to a bill, that it seeks specific performances of a contract relating to personality. Carpenter v. Mut. Safety Ins. Co., 4 Sandf. Ch., 408; Clark v. Flint, 22 Pick., 231; Roundtree v. McLean, 1 Hemp., 245; Sullivan v. Fink, 1 Md. Ch., 59; Waters v. Howland, 1 Md. Ch., 112; City Council v. Page, Spear. (S. C.) Ch., 159; Hoy v. Hansborough, 1 Freem. (Miss.) Ch., 533; Lloyd v. Wheatly, 2 Jones' Eq., 267; Johnson v. Rickert, 5 Cal., 218; Duff v. Fisher, 15 id., 375; Furman v. Clark, 11 N. J Eq., 3 Stock., 306; Mechanics' Bk. v. Seaton, 1 Peters, 299; Cutting v. Danna, 25 N. J. Eq., 265; Corbin v. Tracy, 34 Conn., 325.

Where the property has exceptional value.] Specific performance will be decreed for the delivery of chattels which none but the defendant can supply, and which are necessary to enable the plaintiff to fulfill a contract with third parties. Buxton v. Lister, 3 Atk., 385.

Contracts for the sale of stock.] If a breach of contract can be fully compensated in damages, equity will not interfere. Specific performance will be de-

(4) Where the contract is such as the court cannot perform.

(5) Where the performance of the contract would prove useless.

(6) Where the court would be unable to enforce its own judgment.

(7) Where the enforced performance of the contract would be worse than its non-performance.

(8) Where the contract is voluntary.

(9) Where the plaintiff has elected to proceed in some other manner than for specific performance.

(10) Where the jurisdiction has been taken away by statute.

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creed, however, when the contract to convey stock is clear and definite, and the uncertain value of the property renders it difficult to do justice by an award of damages. White v. Schuyler, 1 Abb. Pr. (N. S.), 300; S. C., 31 How. Pr., 38; Treasurer v. Commercial Co., 23 Col., 390.

Specific performance as to debts.] Specific performance of a contract to borrow or lend money, will not be enforced by a court of equity. Rogers v. Challis, 27 Beav., 175; Siebel v. Mosenthal, 31 L. J. C., 326; Lariss v. Gurety, L. R. 5 P. C., 346. An agreement to give security for a debt will be enforced. Ashton v. Corrigan, L. R., 13 Eq., 76; Robinson v. Cathcart, 2 Cranch, 590; Ogden v. Ogden, 4 Ohio St., 182; Stockley v. Davis, 17 Ga., 177. A parol contract for a mortgage of personal property was made, a valuable consideration being given therefor, and the Statute of Frauds not requiring the same to be in writing—Held, that a court of equity would enforce the contract. Triebert v. Burgess, 11 Md., 452. The creditors of an insolvent firm agreed to sell their claim to one of their number at twenty-five per cent—Held, that the contract, although for the sale of a debt, would be specifically enforced, for the reason that the complainant has not a clear and adequate remedy at law. Cutting v. Dana, 25 N. J. Eq., 265. The following written agreement was made by the owner of a mortgage debt: "that on receiving money from another person, he will pay him a specific portion of the debt when received, and in manner as received." Held, that such an agreement would be specifically enforced. Buck v. Swazey, 35 Me., 41. The vendor of land agreed to release the same from the lien of a mortgage. Held, that specific performance would not be decreed. Bennett v. Abrams, 41 Barb., 619; Barkley v. Barkley, 14 Rich. Eq., 12. In Barry v. Walker (6 B. Mon., 464) land was sold, the purchase price to be paid immediately in order that the same might be released from the lien of certain mortgages; part of the price was paid, and a bill was filed enjoining the vendor, who was insolvent, from selling and from committing waste. A decree was obtained. Afterward the purchaser tendered good notes for the full amount of the purchase money, offered to perform, and filed an amended bill to compel a specific performance of the contract. The land was sold under foreclosure, and bought in by the party to whom it was originally sold, who paid cash for the amount of the lien. Held, that he had a right to extinguish the lien in that manner. Gillis v. Hall, 2 Brems. (Pa.), 342; Broadwell v. Broadwell, 6 Ill., 599; Dailey v. Lichfield, 10 Mich., 29. The grantee of land executed a bond, the consideration being the support of the grantor for life, and, in case of neglect, to reconvey the land. Held, upon failure to perform, that a court of equity would decree a re-conveyance. Robinson v. Robinson, 9 Gray, 447. A contract to indemnify against a pecuniary liability will be specifically enforced, notwithstanding its performance is reversed by a penalty. Chamberlain v. Blue, 6 Blackf., 491; Champion v. Brown, 6 Johns. Ch., 398.

After the foregoing propositions have been discussed, it will be shown:

(11) That the jurisdiction is against the defendant personally.

Lastly will be considered:

(12) Certain cases of quasi-contract in which the court has jurisdiction.

1. *Where there is no common law remedy.*

§ **28**. In many cases though a contract was in conscience obligatory upon both the parties to it, yet the common law, from the strictness of its forms, afforded no remedy to the party injured by the other's non-performance. The defect of justice which hence arose was avoided by the jurisdiction of equity, which in such cases has compelled the specific execution of the contract, if in other respects fit for the intervention of the court.

§ **29**. By the principles of the common law, exact performance by the plaintiff of his part of the contract according to its very terms must be averred and proved; whereas, in equity, a distinction has been made between those terms which are of the essence of the contract and those terms which are not thus essential, and a breach of which it is inequitable for either party to set up against the other as a reason for refusing to execute the contract between them. In these cases the doctrine of common law was forfeiture, the doctrine of equity is compensation. "Lord Thurlow," to quote the language of his successor Lord Eldon, "used to refer this doctrine of specific performance to this: that it is scarcely possible that there may not be some small mistake or inaccuracy; as, that a leasehold interest represented to be for twenty-one years, may be for twenty years and nine months; some of those little circumstances that would defeat an action at law, and yet lie so clearly in compensation that they ought not to prevent the execution of the contract."(*b*) On this ground the jurisdiction rests in all cases where specific performance is decreed with compensation by the plaintiff.

§ **30**. The fact that the common law remedy has been lost

(*b*) In Mortlock v. Buller, 10 Ves., 305-6. See, also, Stewart v. Alliston, 1 Mer., 26, 32.

by the default of the very party seeking the specific performance of a contract will not exclude the jurisdiction, if it be notwithstanding conscientious that the contract should be performed, as in cases where the plaintiff has performed his part substantially, but not with such exactitude as to be able to plead such performance as the common law courts required.(*c*)[1]

§ **31**. But besides these cases, there are many others in which the court interferes, because there is no common law remedy by reason of something in the subject-matter of the contract,(*d*) or the parties to it, or the form in which it is concluded.

§ **32**. Thus the court will give relief in respect of a con-

(*c*) Davis v. Hone, 2 Sch. & Lef., 341, 347.

(*d*) See per James, L. J., in Bewley v. Atkinson, 13 Ch. D., 305 (windows).

[1] This rule is well established, and forms one of the leading features of equity jurisdiction. Performance to the letter is not required; and it is sufficient if the complainant can show that he has not been in fault, and that he has taken all proper steps toward performance. McCorckle v. Brown, 9 Smedes and Marsh., 167; Coale v. Barney, 1 Gill & John., 324, and Voorhees v. De Meyer, 2 Barb. Sup. Ct., 37, are leading cases on this point. In the former case an agreement was entered into on the 27th of November, 1813, between the *cestuis que trust* for life, and of the remainder in fee, and the trustee of a certain estate held by the latter in fee; the object of which was to lease out certain unimproved trust property, to secure to all the *cestuis que trust* an immediate participation in the profits. It was agreed that the trustees should appoint an agent to make leases for ninety-nine years, with liberty of renewal for such rents as should be thought reasonable by the parties interested, payable to the agent, in trust for the *cestuis que trust*, their executors and administrators, in certain proportions. On the 29th of September, 1823, a bill was filed by two of the *cestuis que trust*, against the third, for a specific execution of the agreement, on the ground that the defendant, since the year 1818, had prevented the execution of the leases, and refused to do any act toward carrying the contract into effect. This charge was proved, and it was held that the court would, in the exercise of its duty, satisfy the minor provisions of the agreement only so far as could be done consistently with the great design; that the agreement containing provisions which, because of a technical principle of law, could not be literally performed, the court would give it that construction which the rules of law would tolerate, and the intention of the parties, collected from the whole instrument, would justify; that the failure to comply with an engagement to do a merely nugatory act should not impair the right of the complainants to the specific performance of the agreement; the facts in the case otherwise sustaining the bill; and, further, that the lapse of time did not amount to laches, so gross as to conclude the rights of the parties. In Voorhees v. De Meyer, G. agreed with D. to pay for certain lands in five equal, annual installments. Twenty-eight years after the date of the agreement, having made payments from time to time, G. proposed to D. that he should give him, G., a deed for the lands, and secure the remaining payments by mortgage on the property. D. tendered a deed which was not satisfactory and was refused, and G. filed a bill for a specific performance. Held, that G. had not so far departed from the terms of his contract as to be refused relief; and that where non-compliance with the terms of an agreement does not go to its essence, relief will be granted, notwithstanding the laches of the party seeking to enforce performance. See, also, Shaw v. Livermore, 2 Green's (Iowa) Rep., 338.

tract to assign a chose in action,(*e*) or of a contract concerning the hope of succession of an heir,(*f*) although no damages could have been recovered at common law for contracts dealing with these subject-matters, and it will in a proper case specifically enforce a right of pre-emption, and restrain by injuncion the violation of such a right, and will specifically enforce a compromise.(*g*)[1] In one case Plumer, M. R., intimated the opinion that where a promissory note had been handed over for valuable consideration unindorsed, a court of equity would, at the suit of the holder, compel the transferor, or his personal representative, to indorse it in order to substantiate the right of the transferee.(*h*) A contract between joint tenants of a copyhold estate to divide it between them has been specifically enforced.(*i*)[2]

§ 33. Again, the court will specifically enforce a contract to execute a mortgage, and that even with an immediate power of sale where the money has been actually advanced

(*e*) 1 Mad. Ch., 362.

(*f*) Jones v. Roe, 3 T. R., 88, compared with Beckley v. Newland, 2 P. Wms., 182. and cases infra, § 1502 et seq. See, also, 1 Fonbl. Eq., 216.

(*g*) Homfray v. Fothergill, L. R. 1 Eq., 567, 573; Birmingham Canal Co. v. Cartwright, 11 Ch D., 421. Cf. Lord Carington v. Wycombe Railway Co., L. R. 3 Ch., 377; Lord Beauchamp v. Great Western Railway Co., id., 745.

(*h*) Watkins v. Maule, 2 J. & W., 243; Byles on Bills (11th ed.), 154. Distinguish Edge v. Bumford, 31 Beav., 247.

(*i*) Bolton v. Ward, 4 Ha., 530. See, too, Seton, 530 (contract for exchange).

[1] Every contract cannot be enforced in a court of equity; it is only where it is strictly equitable to do so, that the legal intention and effect will be carried out. Canterbury Aqueduct Co. v. Ensworth, 22 Conn., 608.

[2] Where a legal remedy is obstructed, a court of equity may enforce or set aside a contract to purchase lands, compel deeds of confirmation to be made, and in a case where deeds are lost, or not recorded, a court of equity will intervene. Blight v. Banks, 6 T. B. Mon., 152; Davis v. Hall, 4 id., 23; Cummings v. Coe, 10 Cal., 529. Where without fault of the grantee, a deed was lost before being recorded, the grantor was compelled to give a duplicate deed. A demand must be first made. Conlin v. Ryan, 47 Cal., 71; see Lindeman v. Rinker, 42 Ind., 223. A court of equity will frequently decline to interfere to establish possession of property, when, nevertheless, it will refuse to disturb the possession where it has been obtained without its agency. Crane v. Gough, 4 Md., 316. Where a jurisdiction has been properly acquired, a court of equity will settle the controversy, even in a case which did not afford original grounds of jurisdiction. Brooks v. Stoley, 3 McLean, 523; Pearson v. Darrington, 21 Ala., 169; Martin v. Tidwell, 36 Geo., 332; Franklin Ins. Co. v. McCrea, 4 Greene (Iowa), 229; Handley v. Fitzburgh, 1 A. K. Marsh., 24; State v. McKay, 43 Mo., 594; Armstrong v. Gilchrist, 2 John. Ch., 424, 431; Londer's Appeal, 57 Pa. St., 498. It was held that a judgment for specific performance could not be granted, even in a case where the evidence was sufficient to warrant such a suit. This was in an action by the vendors of real property against the purchaser for damages for the non-fulfillment of contract. The trial was without a jury. Towle v. Jones, 19 Alb. Pr., 449; see Cowenhoren v. City of Brooklyn, 38 Barb., 9. Damages for breach of a covenant to improve land sold for a public square recovered in an action; held no bar to a subsequent suit for specific performance of a covenant to keep the premises forever open as such public square. Stuyvesant v. Mayor of New York, 11 Paige Ch., 414.

either before or at the time of the contract;(*j*) though it will not so enforce a mere agreement to lend, advance, or pay money(*k*) (though the loan be one to be secured by mortgage), while it rests entirely unperformed either by the intended lender(*l*) or by the intended borrower.(*m*) "The Statute of Frauds does not apply to such a case. Therefore if the court has jurisdiction in such a case, any conversation may be made the subject of a suit for specific performance: thus if two friends are walking together and one says, 'Will you lend me £100 at £5 per cent. for a year on good security?' and the other says 'I will,' that conversation might be made the subject of a suit for specific performance in this court if, on the next day, one friend should say 'I do not want the money,' or the other should say 'I will not lend it.' Nothing would be more difficult and more dangerous than the task which this court would have to perform if it were to investigate cases of that description."(*n*)

§ **34.** In one case there was a contract by B. to advance C. £3,000 on the security of some leasehold houses for five years. B. advanced £600 on deposit of the lease of one of the houses. The contract was (in the opinion of the court) that B. should not be entitled to call for the lessor's title. Nevertheless he did call for it, and on its being refused, filed a bill for specific performance of the contract, or for the sale of the property to repay him the £600 and interest. The court considered that the plaintiff was in the wrong, but the defendant submitting to perform the contract without showing the lessor's title, and the plaintiff electing to have a decree, made him pay the costs of the suit, as the price of its interference.(*o*)

§ **35.** In another case S., who had become liable for a debt of W., and with whom W. had deposited title deeds as an indemnity, was held entitled to have a written memorandum of the terms of the deposit signed by W.(*p*)

§ **36.** Again, though no action would lie at common law in respect of a contract to convey by a particular day, which was rendered impossible by the death of the contractor be-

(*j*) Ashton v. Corrigan, L. R. 13 Eq., 76; Hermann v. Hodges, L. R. 16 Eq., 18. Cf. Taylor v. Eckersley, 2 Ch. D., 302.
(*k*) Larios v. Bonany y Gurety, L. R. 5 P. C., 346. Cf. Brough v. Oddy, 1 R. & M., 55.
(*l*) Rogers v. Challis, 27 Beav., 175.
(*m*) Sichel v. Mosenthal, 30 Beav., 371.
(*n*) Per Lord Romilly, M. R., in Rogers v. Challis, 27 Beav., 178.
(*o*) Bass v. Clivley, Taml., 80.
(*p*) Sporle v. Whayman, 20 Beav., 607.

fore that day, yet specific performance would be decreed by the court of chancery against the heir.(*q*)[1]

§ **37**. The court of chancery has also interfered specifically to execute a contract evidenced by a bond given to a wife by her husband, or to a husband by his wife,(*r*) before marriage, though the bond was suspended at common law by the intermarriage.[2]

§ **38**. The same principle equally applies to give the court jurisdiction where, though the contract is in its nature such that a breach of it can be satisfied by damages, yet from some particular circumstances this remedy is not open to the aggrieved party; therefore where a contract for the purchase of timber-trees was comprised in a memorandum which appeared not to be the final contract, but was to be

(*q*) See arguments of counsel in Milnes v. Gery, 14 Ves., 403, and 1 Mad. Ch., 362.
(*r*) Cannel v. Buckle, 2 P. Wms., 242; Acton v. Acton, Prec. Ch., 237. See, too, Gage v. Acton, 1 Salk., 325.

[1] At common law, choses in action are not assignable. Greenby v. Wilcox, 2 John., 1; Coolidge v. Ruggles, 15 Mass., 338. But they may be assigned in equity. Breckenridge v. Churchill, 3 J. J. Marsh., 11. Hopkiss v. Eskridge, 2 Ired. Eq., 54; Spring v. Car. Ins. Co., 8 Wheat., 268. And the assignee has an equitable right enforceable at law in the assignor's name. Dix v. Cobb, 4 Mass., 511; Parker v. Grout, 11 Mass., 157, and note; Wheeler v. Wheeler, 9 Cow., 34; Eastman v. Wright, 6 Pick., 316; Welch v. Mandeville, 1 Wheat., 236. In reference to heirs expectant, it is said, in Davidson v. Little, 22 Penn. (10 Harris), 245, that an unexecuted contract for the sale of land will not be enforced in a court of equity, if it be found unconscionable. But after it has once been executed the chancellor will not interfere on account of its hardship, except in cases of an heir expectant, when the court will, upon that ground alone, declare it void.

[2] In Glaze v. Drayton, 1 Dessau., 109, the contract of the ancestor was decreed to be performed by the infant heir at law, who was allowed six months, after coming of age, to show cause. Upon clear proof of a parol contract and a part performance thereof, the same decree was given against one Wilkinson, a minor, in the case of Wilkinson v. Wilkinson, 1 Dessau., 201. In Saunders v. Simpson, 2 Har. & John., 81, where a father, in 1777, gave a bond to his daughter, binding himself to convey certain lands, but died without doing so, specific performance was decreed against his devisees, on a bill filed by her in 1797. See, also, Newton v. Swazy, 8 N. H. R., 9. In New York, infant or adult heirs of a vendor are bound to fulfill his contract to convey lands, to the extent of the estate that descends to them, and may be compelled to do so, though not named in the contract. But, ordinarily, the court will not compel the heir to enter into personal covenants, in pursuance of an agreement by the ancester. Therefore, where the vendor agreed to convey land by a good and sufficient deed, free of all incumbrances, and died leaving a widow entitled to dower, and heirs, one of whom was an infant, and the heirs were not named in the contract, it was held, in a suit against them for a specific performance of the agreement to convey, that the infant defendant must convey, but without covenants, and that the other defendants must also convey, but with covenants against their own acts, on payment of the sum due by the terms of the contract, deducting out of each payment due, and to become due, a proportionate share of the amount that should be found to be the value of the widow's right of dower. Hill v. Ressegieu, 17 Barb., 162.

made complete by subsequent articles, so that it was doubtful whether the contract, as it then stood, would not have been considered at law as incomplete, and so the plaintiff have been debarred of any remedy there, Lord Hardwicke held that the contract was one which the court of chancery could specifically perform.(*s*) In another case a contract to purchase a debt was enforced against the purchaser, on the ground that the debt had not been so assigned to him as to enable him successfully to sue at law ;(*t*) and in the case of a contract for the purchase of government stock, the fact that the plaintiff was not the original holder of the scrip, but merely the bearer, which rendered it doubtful whether he could maintain an action at law upon the contract, was one ground on which the court of chancery was held to have jurisdiction.(*u*)[1]

§ **39**. It is said that before the time of Lord Somers the practice of the court of chancery was to send the parties to law, and to entertain the suit only in case of the plaintiff there recovering damages,(*v*) a practice which, of course, involved the proposition that specific performance could not be granted except in cases where damages could be recovered at law.[2] The case in which this principle was the most distinctly maintained was that of Dr. Bettesworth v. The Dean and Chapter of St. Paul's,(*w*) decided by Lord King in 1726, with the assistance of Raymond, C. J., and Price, J. A lease had been granted by the defendants previously to the disabling statute of 13 Eliz., with a covenant to renew for ninety-nine years, and the plaintiff sought a renewal for the term allowed by the statute, which the Lord Chancellor refused, on the ground that no action could have been maintained on the covenant after the passing of the statute. "I take this to be a certain clear rule of equity," said Ray-

(*s*) Buxton v. Lister, 3 Atk., 383; but see infra, §§ 317, 488.
(*t*) Wright v Bell, 5 Pri. 325. Cf. Adderley v. Dixon, 1 S. & S., 607.
(*u*) Doloret v. Rothschild, 1 S. & S., 590.
(*v*) Per Clarke, M. R., in Dodsley v. Kinnersley, Ambl., 406.
(*w*) Sel. Cas. in Ch., 66.

[1] See Costwaight v. Hutchinson, 2 Bibb., 407; Gould v. Womack, 2 Ala., 83. In New York all contracts between persons in contemplation of marriage remain in full force after such marriage takes place. Laws of New York, 1849, p. 529, ch. 375, § 3.

[2] Where it is not clear that a court of law can give the relief asked for, chancery will entertain jurisdiction. West v. Wayne, 3 Miss., 16; Wheeler v. Clinton Canal Bank, Harring Ch., 449; Philips v. Thompson, 1 John. Ch., 132.

mond, C. J.,(*x*) "that a specific performance shall never be compelled for the not doing of which the law would not give damages. The covenant to oblige them to make a lease for ninety-nine years is gone, and damages cannot be recovered for part of a covenant, and I, therefore, am of opinion equity cannot interfere." This decision, which was opposed by the opinion of Jekyll, M. R., was reversed in the House of Lords; and it is abundantly evident, from the cases already cited, that the jurisdiction at present exercised is not restrained within these limits, and that there are many cases in which specific performance is granted where no action for damages could be maintained.(*y*)[1]

2. *Where there is no adequate common law remedy.*
3. *Where there is an adequate common law remedy.*

§ **40**. The propositions that the court will interfere in specific performance where the common law remedy exists, but is not adequate, and that the court will not interfere where the common law remedy exists and is adequate, being in the nature of converse propositions will be conveniently considered together.[2]

(*x*) Page 69.

(*y*) Per Lord Redesdale in Lennon v. Napper. 2 Sch. & Lef., 682; Cannel v. Buckle, 2 P. Wms., 242. The passage in Williams v. Steward, 3 Mer., 491, to which Mr. Justice Story (Eq. Jur., § 741) has referred as a dictum of Grant, M. R., is the language of counsel *arguendo*.

[1] "The whole class of cases of specific performance of contracts respecting real estate, where the contract is by parol, and there has been a part performance, or where the terms of the contract have not been strictly complied with, and yet equity relieves the party, are proofs that the right to maintain a suit in equity does not, and cannot, properly, be said to depend upon the party's having a right to maintain a suit at law for damages. In cases of specific performance, courts of equity sometimes follow the law, and sometimes go far beyond the law; and their doctrines, if not wholly independent of the point, whether damages would be given at law, are not, in general, dependent upon it. Whoever should assume the existence of a right to damages in an action at law, as the true test of the jurisdiction in equity, would find himself involved in endless perplexity; for sometimes damages may be recoverable at law, where courts of equity would yet not decree a specific performance; and, on the other hand, damages may not be recoverable at law, and yet relief would be granted in equity." Story's Eq. Jur., § 741. See, also, Getchell v. Jewett, 4 Greenl., 350; Andrews v. Andrews, 28 Ala., 432, which coincide in the doctrine as explained by Mr. Justice Story, and as laid down in the text. There are, however, contrary decisions in this country. See Allen v. Beal, 3 A. K. Marsh., 554, and Smith v. Carney, 1 Litt., 293. In this latter case relief was denied upon a verbal contract for the sale of land, after a delay of five years, upon the express ground that equity would not relieve where the law would not award damages, and *assumpsit*, the only action which could be maintained at law, the contract having been made before the introduction of the Statute of Frauds, was barred by the delay.

[2] A specific performance will be decreed, when the party wants the thing in specie, and cannot be otherwise compensated; where an award of damages

§ **41**. The only remedy at common law for the non-performance of a contract was in damages, that is to say, in the payment of a sum of money by the party who had broken the contract to the party injured by that breach.[1] If money were in all cases a perfect measure of the injury done by this breach, it is evident that an exact equivalent for the wrong might be made, and that the justice done would be complete. But money is an exact equivalent only when by money the loss sustained by the breach of the contract can be fully restored. Now in a vast variety of cases this is not so; for though one sovereign or one shilling is to all intents and purposes as good as any other sovereign or shilling, yet one landed estate, though of precisely the same market value as another, may be vastly different in every other circumstance that makes it an object of desire; so that it evidently follows that there would be a failure of justice, unless some other jurisdiction supplemented that of common law, by compelling the defaulting party to do that which in conscience he is bound to do, namely, actually and specifically to perform his contract. The common law treats as universal a proposition which is for the most part, but not universally, true, namely, that money is a measure of every loss.(*z*) The defect of justice which arose from this universality of the common law principle was met and remedied in certain cases by the jurisdiction of courts of equity to compel specific performance.

§ **42**. Even when money is alone in question, the common law remedy is in some instances less beneficial than that afforded by courts of equity, and where this is so, a ground is laid for specific performance if otherwise a proper remedy. So where A. gave a note to B., and C. agreed with B. for the relinquishment of his (B.'s) claim against A. on the payment of certain sums, for which the notes were, in the contemplation of equity, to stand only as a security, it was held that the court of chancery would specifically per-

(*z*) See Aris. Eth. Nic. lib. 9, ch. 1.

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would not put him in a situation as beneficial as if the agreement were specifically performed; or where the compensation in damages would fall short of the redress to which he is entitled. Philips v. Berger, 2 Barb. Sup. Ct., 608; Phyfe v. Wardell, 3 Edw. Ch., 47. Stuyvesant v. Mayor, etc., of New York, 11 Paige's Ch., 414; Nevitt v. Gillespie, 1 How. (Miss.), 108.

[1] See McLane v. Elmer, 4 Ind., 239.

form the contract, though the relations between the parties might have been worked out by actions at law.(*a*)

§ **43**. Leach, V. C., seems to have considered that the fact that the remedy in damages given at common law depended for its beneficial effect upon the personal responsibility of the defendant, gave the other party to the contract a right to sue in equity for its actual performance.(*b*) It is evident that this principle applies to all damages, and, if it were admitted, would give the court jurisdiction by way of specific performance in all cases of contract, whether for the sale of chattels or of any other nature, which certainly is not the law of the court.

In another case the same learned judge appears to have held that the circumstance that damages at law would not accurately represent the value of the contract to either party was a ground for granting specific performance. The contract in that case was for the sale of debts proved under two commissions of bankruptcy ; and Leach, V. C., granted specific performance, considering that to compel the plaintiff to accept damages would be to compel him to sell those dividends which were of unascertained value at a conjectural price.(*c*) The learned judge just named seems to have shown a tendency to extend the jurisdiction in specific performance somewhat more liberally than most other judges ;(*d*) and the mere want of exactitude in the measure of damages at common law has not always been held a sufficient ground for the equitable jurisdiction.[1]

§ **44**. The ground of this jurisdiction having been the inadequacy of the remedy at common law, it followed that where that remedy was adequate, chancery did not interfere

(*a*) Beech v. Ford, 7 Ha , 208 (affirmed by Lord Cottenham). Cf. Cogent v. Gibson, 33 Beav., 557 (purchase-money of patent).
(*b*) Doloret v. Rothschild, 1 S. & S., 590.
(*c*) Adderley v. Dixon, 1 S. & S., 607. See per Lord Hatherley (then Wood, V. C.), in Pollard v. Clayton, 1 K. & J., 462.
(*d*) See Withy v. Cottle, 1 S. & S., 594; Kenney v. Wexham, 6 Mad., 355; Cf. Brealey v. Collins, You., 317, 330.

[1] *When the court will refuse to act.*] In all cases where it is clearly inequitable to grant it, the court will refuse to do so. In exercising its discretionary powers, it will act with more freedom than when exercising its ordinary powers. Munch v. Shobel, 37 Mich., 166; St. Paul. Div. v. Brown, 9 Min., 157; Snell v. Mitchell, 65 Me., 48; Tyson v. Watts, 1 Md. Ch., 13; Fish v. Lightmer, 44 Mo., 268; Hudson v. King, 2 Heisk. (Tenn.), 560; Quinn v. Roath, 37 Conn., 16; Higginbottom v. Short, 25 Miss., 160; Inglehart v. Veil, 75 Ill., 63; Sweeney v. O'Hara, id., 34; Willard v. Taylor, 8 Wall., 557; Marble Co. v. Ripley, 10 id., 339; Borgan v. Daughdrill, 51 Ala., 312; Daniel v. Frasier, 40 Miss., 507; O'Brien v. Penty, 48 Md., 562.

to compel specific performance.[1] It is on this ground that the court has generally refused specific performance in respect of government stock or chattels, as will be hereafter seen, and refuses it in all cases where the contract is satisfied by a mere payment of money.(*e*)

§ **45**. The principle has been recognized in several other cases. It was one of the grounds on which Knight Bruce and Lord Cranworth, L. JJ., acted in dismissing the bill in Lord James Stuart v. London and Northwestern Railway Co.,(*f*) so far as regarded specific performance and only putting the defendants on terms to make certain admissions in any action at law to be brought by the plaintiff against them—their lordships considering that, the railway having been abandoned and complete relief being in their opinion obtainable at law, the case was not one for specific performance. It was also one of the reasons alleged by Lord Cranworth, L. J., for dismissing the bill in Webb v. Direct London and Portsmouth Railway Co.,(*g*) he considering that under the circumstances the vendor could obtain complete relief at law. The authority of these decisions was subsequently questioned by Lord St. Leonards,(*h*) but only as to the applicability of the principle to the circumstances, and not as to the validity of the principle itself.

§ **46**. In one case specific performance was sought of a contract for a tenancy from year to year, the contract specifying that the tenant was in all respects to abide by the terms entered into by a previous tenant, and that the tenant should pay for a contract to be drawn up; it was contended that the court would therefore interfere for the purpose of settling the proper terms of the contract. But the court thought the remedy at law was adequate, and that the full

(*e*) See Brough v. Oddy, 1 R. & M., 55; Larios v. Bonany y Gurety, L. R. 5 P. C., 346; and cf. the cases on contracts with a penalty, infra, § 114 et seq.

(*f*) 1 De G. M. & G., 721.
(*g*) 1 De G. M. & G., 521.
(*h*) Hawkes v. Eastern Counties Railway Co., 1 De G. M. & G., 737; S. C., 5 H. L. C., 331.

[1] There is probably no principle of equity more thoroughly established than this. Dhetegoft v. London Assur. Co., Mosely's R., 83; S. C., 1 Atkin's R., 547; Rose v. Clarke, 1 Y. & Col., 534; Hammond v. Messenger, 9 Sim., 327; Rees v. Parish, 1 McCord's Ch., 59; Bell v. Bemen, 3 Murph., 273; Sampson v. Hunt, 1 Root, 317; Pitkin v. Pitkin, 7 Cow., 315; Adair v. Winchester, 7 Gill & John., 114; Carter v. United Ins. Co., 1 John. Ch., 463; Smiley v. Bell, Mart. & Yerg., 378; Mosely v. Boush, 4 Rand., 392; Thompson v. Mauley, 16 Geor., 440; Mechanics' Bank v. Debolt, 1 Ohio St., 591; Bonebright v. Pease, 3 Mich. (Gibbs), 318; Deggett v. Hart, 5 Florida, 215.

terms of the contract might be shown there, and therefore refused to decree performance.(*i*)

§ **47**. On this ground also, as well as that of the incapacity of the court to execute the works, the court of chancery refused specifically to perform a contract to make a branch railway, although the contract for the execution of it had been entered into during the pendency of the bill before Parliament, and when several of the directors had thoughts of withdrawing the bill, and would have in fact done so (as the bill of complaint alleged), but for the contract in question.(*j*)

§ **48**. And where a bill sought the specific performance of a contract which would have been effected by a mere account of profits and a payment of the amount found due, and there was no obstacle to the recovery of the amount at law, the court dismissed the suit.(*k*)

§ **49**. In analogy with this principle, in a case in which the plaintiffs sought the specific performance of a contract to grant a way-leave for a railway for a term of sixty years, and between the filing of the bill and the hearing the plaintiffs had obtained statutory powers to take the land in fee, Stuart, V. C., considered this to be a circumstance strongly influencing the discretion of the court against specific performance.(*l*)

§ **50**. It may appear, at first sight, that inasmuch as money in exchange for the estate is what the vendor of land is entitled to, he has a complete remedy in an action for damages, and therefore cannot sustain an action for the specific performance of the contract. But on further consideration it will be apparent that damages will not place the vendor in the same situation as if the contract had been performed; for then he would have got rid of the land and of all the burdens and liabilities attaching to it, and would have the purchase-money in his pocket; whereas, after an action for damages, he still has the land, and, in addition, damages—representing, in the opinion of a jury, the differ-

(*i*) Clayton v. Illingworth, 10 Ha., 451.

(*j*) South Wales Railway Co. v. Wythes, 1 K. & J., 186; S. C., 5 De G. M. & G., 880. See, too, Greenhill v. Isle of Wight (Newport Junction) Railway Co., 19 W. R., 345.

(*k*) Ord v. Johnston, 1 Jur. N. S., 1063; 4 W. R., 37 (Stuart, V. C.). See, also, Sturge v. Midland Railway Co., 6 W. R., 233; 4 Jur. N. S., 273. Cf. Bagnell v. Edwards, I. R. 10 Eq., 215.

(*l*) Meynell v Surtees, 3 Sm. & Gif., 101. See, also, per Lord Cranworth in Morgan v. Milman, 3 De G. M. & G., 35.

ence between the stipulated price and the price which it would probably fetch, if re-sold, together with incidental expenses and any special damage which he may have suffered.(*m*) The doctrine of equity, with respect to the conversion of the land into money, and of the money into land upon the execution of the contract,(*n*) and the lien which the vendor has on the estate for the purchase-money, and his right to enforce this by the aid of the court, are additional reasons for extending the remedy to both parties. Accordingly, it is well established that the remedy is mutual, and that the vendor may bring his action in all cases where the purchaser could sue for specific performance of the contract, and this independently of any question on the Statute of Frauds.(*o*)

§ **51**. On the principle that damages are a sufficient satisfaction, it is now perfectly settled that specific performance will not be enforced of a contract for the transfer of stock in the public funds.

§ **52**. It appears, that in one instance, Lord Hardwicke did grant specific performance of such a contract;(*p*) but in the earlier case of Cuddee (or Cud) v. Rutter,(*q*) Lord Macclesfield, overruling a decision at the rolls, refused to perform a contract to transfer South Sea stock, though by the decree he undertook to arrange the settlement between the parties. His Lordship assigned three reasons for this decision: first, the nature of the subject-matter of the contract; secondly, the circumstance that the defendant was not possessed of the stock at the time of the contract; and, thirdly, that the liability to sudden rise and fall in stock made the day a most material part of the contract, and therefore rendered it an improper one for the court to carry into execution. This principle was adopted by Gilbert, C. B.,(*r*) and stated to be the settled doctrine of the court by Lord Eldon.(*s*)

§ **53**. In a case before Leach, V. C., a bill for the specific performance of a contract to sell Neapolitan stock was supported; but this was partly on the ground of its praying

(*m*) Eastern Counties R'y Co. v. Hawkes 5 H. L. C., 331, 359, 376; Lewis v. Lord Lechmere, 10 Mod., 503.
(*n*) Id.
(*o*) Clifford v. Turrell, 1 Y. & C. C. C., 138, 150; Walker v. Eastern Counties Railway Co., 6 Ha., 594; Kenney v. Wexham, 6 Mad., 355
(*p*) See Nutbrown v. Thornton, 10 Ves., 161.
(*q*) 5 Vin. Abr., 538, pl. 21; S. C., 1 P.Wms., 570; 1 W. & T., L. C., 756 (4th ed.).
(*r*) Cappur v. Harris, Bunb., 135.
(*s*) In Nutbrown v. Thornton, 10 Ves, 161,

the delivery of the certificates which would constitute the plaintiff the proprietor of a certain quantity of the stock, and partly because the plaintiff, not being the original scripholder, but merely the bearer, it was doubtful whether he would be able to maintain his action at law.(*t*) In another case the same judge overruled a demurrer to a bill by the vendor of a life-annuity payable out of dividends of stock, on the ground that the purchaser could clearly maintain such a bill, and that the remedy must be mutual.(*u*) But it seems that the court would not enforce specific performance of a contract to sell a life-interest in the public funds.(*v*)

§ **54**. With regard to shares in companies the same principle does not apply. "In my opinion," said Shadwell, V. C.,(*w*) "there is not any sort of analogy between a quantity of £3, per cents or any other stock of that description (which is always to be had by any person who chooses to apply for it in the market), and a certain number of railway shares of a particular description, which railway shares are limited in number, and which, as has been observed, are not always to be had in the market;" and, accordingly, specific performance was enforced of a contract to sell a certain number of railway shares, the shares not being particularized. In a subsequent case, Lord Chelmsford stated that there was no doubt that a contract for the sale of railway shares is capable of being enforced ;(*x*) and in a subsequent chapter(*y*) many recent cases will be referred to, which have arisen in respect of contracts for the sale of shares. It may have been on this principle that Lord King disallowed a demurrer to a bill for the transfer of York building stock ;(*z*) but a different view seems to have been previously entertained by Lord Macclesfield, inasmuch as he dismissed a bill for the transfer of £1,000 of the same stock.(*a*)[1]

(*t*) Doloret v. Rothschild, 1 S. & S., 590.
(*u*) Withy v Cottle, 1 S. & S , 174.
(*v*) Brealey v. Collins, You , 317, 330.
(*w*) Duncuft v. Albrecht, 12 Sim , 189, 199. See Jackson v. Cocker, 4 Beav., 59.
(*x*) Chèale v. Kenward, 3 De G. & J., 27.
(*y*) Part VI, ch. 1.
(*z*) Colt v. Nettervill, 2 Sim., 304.
(*a*) Dorison v. Westbrook, 5 Vin. Abr., 540, pl. 22.

[1] See Story's Eq. Jur., § 744; Ferguson v. Paschall, 11 Miss , 267; Brown v. Gilliland, 3 Dessau., 539; Strasbourg R. R. Co. v. Elchternact, 21 Penn., 220, authorities in unison with the text. A contract for the sale of stock, on time, by a person who is not the owner of the stock at the time, is void though made through the medium of a broker, by whom the principal is not disclosed. And money paid on such a contract may be recovered from the broker, at any time

§ **55**. A vendor of shares may maintain an action against the purchaser to compel him to complete the purchase by the execution and registration of a proper transfer,(*b*) and to indemnify the vendor against future calls.(*c*)

In like manner the company may sue a person who has contracted with the company to take shares from it.(*d*) Many difficult questions have arisen as to the nature and effects of contracts to take shares, which will be considered separately in a later chapter.(*e*)

§ **56**. The court for the most part refuses to interfere in respect of chattels, both because damages are a sufficient remedy, and because the price of such articles, especially of merchandise, varies so as often to render the specific execution of contract for their sale and delivery an act of injustice, entailing perhaps ruin on one side, when upon an action that party might not have paid perhaps above a shilling damages.(*f*)[1] As these principles, however, do not apply to all cases of chattels, exceptions arise which we shall now consider.

§ **57**. When the chattel in question is unique, when there is, over and above the market value, that which has been called the *pretium affectionis*, the court, whether the plaintiff's right has arisen from contract or not, has interfered and not left him to his common law remedy. The leading case in this branch of the law is Pusey v. Pusey,(*g*) in

(*b*) Shaw v. Fisher, 2 De G. & Sm., 11; 5 De G. M. & G., 596. Cf. Ward and Henry's Case (where the purchaser had filed his bill for specific performance), L. R. 2 Eq , 226; 2 Ch., 431.

(*c*) Wynne v. Price, 3 De G. & Sm., 310; Walker v. Bartlett, 18 C. B., 845.

(*d*) New Brunswick, etc , Co. v. Muggeridge, 4 Drew., 686. See, also, Sheffield Gas Consumers Co. v. Harrison, 17 Beav., 294; Oriental Inland Steam Co. v. Briggs, 2 J. & H., 625; 4 De G. F. & J., 191; Odessa Tramways Co. v. Mendel, 8 Ch. D., 235.

(*e*) Part VI, ch. 1.

(*f*) Per Lord Hardwicke in Buxton v. Lister, 3 Atk , 384. In Norton v. Serle, Finch, 149, Lord Nottingham specifically performed a charter-party by directing the payments to be made in pursuance of it. See, also, Clarkingbould v. Curtis, 21 L. J. Ch., 541, and Lord Westbury in Holroyd v. Marshall, 10 H. L. C., 209. Where the delivery of chattels is only part of a contract otherwise enforceable, the contract may be performed. Marsh v. Milligan, 3 Jurs. (N. S.), 979 (Wood, V. C.).

(*g*) 1 Vern., 273.

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before he has paid it over. Gram v. Stebbins, 6 Paige, 124. Stock is considered as a chattel, and, therefore, as will be seen hereafter, is perfectly compensated in damages. Buxton v. Lister, 3 Atk., 383. And, indeed, it is viewed with even less favor than chattels generally. Brown v. Gilliland, 3 Des., 529. See further, Austin v. Gillespie, 1 Jones' Eq. (N. C.), 261, and Bissell v. Farmers and Mechanics' Bank of Michigan, 5 McLean, 465.

[1] The ground upon which courts of equity refuse to interfere, in cases of this kind, is that there is an adequate remedy provided at law; but wherever a breach of the contract cannot be compensated by damages, equity will grant relief. Sullivan v. Fink, 1 Maryl. Ch. Decis., 59; Roundtree v. McLean, 1 Hemp., 245; Waters v. Howland, 1 Md. Ch. Decis., 112; Lloyd v. Wheatley, 2 Jones' Eq. (N. C.), 267.

which the heir of the family of Pusey recovered possession by a bill in equity of the celebrated Pusey horn; the grounds of the decision are insufficiently reported, but the case "turned," to quote Lord Eldon's language in respect of it,(*h*) "upon the *pretium affectionis*, independent of the circumstance as to tenure, which could not be estimated in damages." This has been followed by other similar cases, one having relation to an ancient silver altarpiece, remarkable for a Greek inscription and dedication to Hercules,(*i*) another to a tobacco-box of a remarkable and peculiar kind,(*j*) another to masonic dresses and ornaments,(*k*) and another to a very finely engraved cherry-stone.(*l*)[1]

(*h*) In Nutbrown v. Thornton, 10 Ves., 163.
(*i*) Duke of Somerset v. Cookson, 3 P. Wms., 390.
(*j*) Fells v. Read, 3 Ves., 70.
(*k*) Lloyd v. Loaring, 6 Ves., 773. See, also, Saville v. Tancred, 1 Ves. Sen., 101; S. C., 3 Sw., 141, n.; Lady Arundell v. Phipps, 10 Ves., 139; Lowther v. Lord Lowther, 13 Ves., 95. A ship is probably within this principle. See Lynn v. Chaters, 2 Ke., 521, and Claringbould v. Curtis, 21 L. J. Ch., 541; De Mattos v. Gibson, 4 De G. & J., 276. Bills have been filed for specific performance of contracts for the sale of ships. See part VI, ch. 5, infra.
(*l*) Per Lord Hardwicke in Pearne v. Lisle, Ambl., 77, in which case a specific delivery of negroes was prayed, "but that is not necessary," said his lordship, "others are as good."

[1] Wherever there is anything peculiar in the value of the article, real estate or chattel, that cannot be compensated in damages, because of the especial value which may be placed upon it, on account either of its individual or associate qualities, courts of equity take jurisdiction. Clark v. Flint, 22 Pick., 231; Chamberlain v. Blue, 6 Blackf., 491. In the southern states numerous cases have arisen in regard to slaves, which are well adapted to display the true grounds upon which equity enforces, or refuses to enforce, a personal contract. In South Carolina, in the earlier cases, it was held to be a general rule, that chancery did not enforce specific execution of contracts relating to personal property, and that the circumstance that slaves were the subjects of the contract, did not create an exception. Farley v. Farley, 1 McCord's Ch., 506. Subsequently, in the case of Starter v. Gordon, 2 Hill. Ch., 121, the considerations which give to domestic slaves a specific character and an individual value, in relation to their owner, were brought fully into view, and it was decided, that, as a general rule, a bill will lie for the specific delivery of slaves, as for the specific performance of a contract for the sale of lands, but that there might be exceptions to the rule. If it appeared that the purchaser contracted for the slaves as merchandise to sell again, this, according to the expression in Buxton v. Lister, would be merely a matter in the way of trade, and, in such a case, complete justice might be done by a compensation in damages. Shortly after, in Horry v. Glover, 1 McCord, 515, the rule was laid down as follows: "That if a man's slave has come into the possession of another, who refuses to deliver him, or if he has contracted for specific slaves, he has a right to a specific delivery; but if the contrary appears, that he contracted for slaves generally, with no view to any particular individuals, or if they were contracted for as merchandise, to sell again, the remedy is at law." In Young v. Burton, 1 Mullan's Eq., 256, the subject was again discussed in the court of errors, and the rule was there propounded to be thus: "First, that a bill well lies for the specific delivery of slaves, generally, which are withheld from the possession of the rightful owner. Second, that it is difficult to give jurisdiction to the court, to state, in such bill, that the slaves are the property of the complainant, and that their possession is withheld by the defendant." See, also, Bobo v. Grimbe & McMartin, 1 McMull. Eq., 304; Fraser v. McClenachan, 2 Rich. Eq., 79; Ellis v. Commander, 1 Strobh's Eq., 188. In the late case, however, of Bryant v. Robert, 1 Strobh's Eq., 335, the limits of equity jurisdiction on this subject

§ 58. These particular cases were suits grounded on tort or trust; but the same principle applies to cases of contract relating to chattels.

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were more specially and precisely defined, and the generality of the previous rule, perhaps, somewhat qualified. In that case a slave had been sold, and a mortgage taken upon him for the purchase money, and he had again passed through the hands of several vendees; the sureties of the original mortgagor then paid the debt, and took an assignment of the mortgage, and sought to recover the slave. "I think," said Harper, C., "there is a misconception in supposing this a case in which a bill will lie for the specific delivery of a slave. The general principle on which such a bill may be sustained, as determined by the cases of Sartor v. Gordon, Trapier v. Glover and Young v. Burton, rests on these grounds: that where an owner has had possession of a slave, and he has been deprived of it by the act of another, the presumption is, that there may be some qualities in the slave which would render him of more value to the owner than could be compensated by the price of such a slave, estimated at his mere market value. So, where a party contracts for the purchase of specific slaves, it is presumed that he may have made his contract with a view to some particular qualities in the slaves themselves, for which ordinary damages would not be a sufficient compensation. Or, as in Trapier v. Glover, where one is entitled to slaves by the gift or limitation of a friend, relation or ancestor, there is very sufficient reason why he should have the slaves themselves, instead of any damages for their estimated value. A general expression is used in one of the cases, that where a party states a defendant to be in possession of his slave, he states a case entitling him, *prima facie*, to the interference of this court. And so it is; but it must be taken with the qualifications I have suggested from the context of the cases. An exception is made in the cases, when it appears that without any view to peculiar qualities, there is a contract for slaves, to be sold again as merchandise The same reason applies, and more strongly, in the case of a mortgagee of slaves. He is not supposed to know anything of the peculiar qualities of the slaves, except that he might form an estimate of the market value of such slaves, and certainly not to have the same attachments or knowledge of their character and qualifications, as the owner, who has been in possession of them and has been deprived of it. In this court the mortgagee, though having the legal title, is not considered, in any manner, as the owner of the slaves; as, in a court of equity, in England, the mortgagee of land is not considered the owner. He is regarded as having taken a pledge or security for his debt, with no view to the possession of the property itself. His object is merely the recovery of his money. In Alabama, principles quite the same with those defined by Mr. Chanceller Harper, are laid down in Savery v. Spence, 13 Ala., 561, which related to a contract about slaves, that clearly involved pecuniary considerations only. "A court of equity," said Dargan, J., "will not decree a specific execution of a contract in reference to personal property, when compensation for the breach of contract in damages furnishes a complete and satisfactory remedy. Story's Eq. Jur., § 26. A court of equity will, in some instances, interfere, and decree a specific performance of a contract, in reference to personal property; but then it must be shown that a court of law cannot give full and complete redress by compensation in damages, for a breach of the contract, either from the nature of the contract itself, or from the peculiar character of the subject-matter of the contract, neither of which is shown in the present case, and therefore the complainant should be remitted to a court of law, which is fully competent to give redress in this case, if there has been a violation of the terms of any contract in reference to slaves." In Mississippi, in the case of Murphy v. Clark, 1 S. & M., 221, a bill was filed for the specific delivery of slaves, and the objection to the jurisdiction was urged that there was an ample and complete remedy at law, and that the bill did "not disclose those circumstances which are necessary to authorize the interposition of equity, or, in the technical phrase of the books, the *pretium affectionis* was not set forth." Mr. Justice Clayton, after an examination of the authorities, said that the cases, to his apprehension, estab-

§ 59. Accordingly in Falcke v. Gray, (*m*) Kindersley, V. C., sustained a bill by a purchaser for the specific performance of a contract to sell to him for £40 two china jars; and in Thorn v. The Commissioners of Works, (*n*) Lord

(*m*) 4 Drew., 651.
(*n*) 32 Beav., 490. Note that when the court has adjudged the delivery up of chattels, execution of the judgment will generally not be stayed pending an appeal to the House of Lords, Harrington v. Harrington, L. R. 3 Ch. 564; cf. Wilson v. West Hartlepool, etc., Railway Co. (No. 2), 34 Beav., 414; Ord. LVIII. r. 16.

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lished the principle, "that wherever the bill states circumstances, from which the court may fairly infer that the owner prefers the property in specie to damages, and that this preference is of a character which it is not unreasonable to indulge, and exists in reference to property for which damages at law might not be a full compensation, equity will entertain jurisdiction" The point was not considered as judicially settled by this case, and came up again in Butler v. Hicks, 11 S. & M., 79, where a majority of the court confirmed the principle of Murphy v. Clark. But Sharkey, C. J., dissented, holding that the *pretium affectionis* should not be inferred, but established. The same subject was discussed in an interesting manner in Dudley v. Mallery, 4 Geor., 52. "His honor, the presiding judge," said Lumpkin, J., in delivering the opinion of the supreme court in error, "held, in accordance with the recent South Carolina cases, that a bill well lies in a court of equity for the specific delivery of slaves, which are withheld from the possession of the rightful owner, and that it is sufficient to give jurisdiction to the court, to state in such bills, that the slaves are the property of the complainant, and that their possession is withheld by the defendant." But it may be submitted, that in this, as well as in other cases, the subject has been treated more with regard to *humanity*, than with reference to the peculiar doctrines of a court of chancery in relation to chattels and their specific delivery. Thus the learned judge goes on to say, "We yield our unqualified approval of the motive which has prompted these adjudications, namely, humanity to the slave, the interest of the owner, and a just regard for the ties which bind the master and slave together. Those who are acquainted with this institution know that the master and slave form one family, or social compact, being usually reared together on the same lot or plantation, and feeling toward each other the kindest sympathies of our nature. * * * Instead of weakening, our desire is to maintain and promote this mutual attachment and good will. But we cannot, for the very reasons assigned in those cases, go to the extent of holding that it is sufficient merely to allege in the bill, that the slaves ought to be recovered, are the property of the complainant, and withheld by the defendant. In many, I am prepared to say from my own experience, in a majority of the suits instituted for the recovery of slaves, humanity to both races requires that there should not be a specific delivery. * * * Female slaves are sometimes pledged for the payment of loaned money, and the borrower returns after the lapse of many years, tenders payment and claims the right to redeem his property, which has multiplied to a numerous family; here, as it often happens, the best feelings of our nature are opposed to the legal or equitable right. Slaves, then, being by our law chattels, we think it best, that as a general rule, chancery should not entertain a bill for the specific delivery, and that, to give jurisdiction, it is necessary to charge and prove peculiar circumstance—as, that they are family servants, a carpenter, blacksmith, wagoner, hostler, etc. This will give the defendant an opportunity of stating, in his answer, the peculiar circumstances connected with his possession; and the special jury, under the direction of the chancellor, will constitute a fit and proper tribunal to pass upon the peculiar features of each case, and to decide either a specific delivery of the property, or its equivalent in money." In North Carolina, in the case of Williams v. Howard, 3 Murph., 34, though the point was not considered as necessarily arising, the judges expressed their opinions upon it. "I have no hesitation in giving it as my decided opinion," said Taylor, C. J., "that the reason of the rule in relation to the specific execution of contracts relating to chattels does not apply to slaves, that they form an exception for reasons

Romilly, M. R., made a decree for the specific performance of a contract for the sale to the plaintiff of the arch stone, the spandrill stone, and the Bramley Fall stone contained in old Westminster Bridge, which had been pulled down. In this case, though elaborately argued, no objection seems to have been taken to the jurisdiction.

§ **60**. There is a dictum of Lord Westbury in the House of Lords which puts the jurisdiction as regards chattels, as if extending to every case where the contract relates to specific property. "A contract for the sale of goods," said his lordship,(*o*) "as, for example, of 500 chests of tea is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular; but a contract to sell 500 chests of the particular kind of tea which is now in my warehouse in Gloucester is a contract relating to specific property, and which would be specifically performed. The buyer may maintain a suit in equity for the delivery of a specific chattel when it is the subject of a contract, and for an injunction (if necessary) to restrain the seller from delivering it to any other person." It may be doubted whether this dictum does not express a more complete system of jurisprudence than that which we possess, and whether the records of the court of chancery contained many bills for the specific performance of contracts relating to specific chattels of a mercantile value like tea.(*p*)

(*o*) In Holroyd v. Marshall, 10 H. L. C., 209, 210.

(*p*) Consider Heathcote v. North Staffordshire Railway Co., 2 Mac. & G., 112; per Lord Cranworth in Hoare v. Dresser, 7 H. L. C., 317-8; Fothergill v. Rowland, L. R. 17 Eq., 132.

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equally cogent, or more so than those applicable to land. With respect to other chattel property, justice may be done at law by damages for non-performance, and therefore equity will not interpose; but for a faithful or family slave, endeared by a long course of service or early association, no damages can compensate; for there is no standard by which the price of affection can be adjusted, and no scale to graduate the feelings of the heart" "All the principles," said Henderson, J., in the same case, "which induce a court of equity to compel the specific execution of a contract for the sale of lands, or some favorite or personal chattel, apply with equal, if not stronger force, to the case of slaves." In Virginia and Tennessee, the rule is much, if not quite, the same as in Mississippi. In Summers v. Bean, 13 Gratt., 404, it is said that the specific delivery of slaves will be decreed regardless of their possessing or not possessing peculiar qualities. In the latter state it was held, in Loftin v. Espy, 4 Yerg., 84, that although, as a general rule, where there is an adequate remedy at law, equity will not interfere, yet there is an exception in regard to slave property. In Kentucky, it would seem, that a specific performance of slaves will be granted or refused upon the same grounds as other chattels; though the discretion in the chancellor is very broad. Caldwell v. Myers, Hardin, 551.

§ **61**. It does not appear to follow, from the authorities referred to or from principle, that the vendor of a chattel can maintain an action for specific performance in all cases where a purchaser of the same chattel could do so.

It also appears that if the chattel be of a peculiar value, but by contract between the parties a price has been put upon the chattel, that circumstance has been treated as precluding the jurisdiction, for it is an admission that by a money payment full relief can be had.(*q*)

§ **62**. Hitherto unique chattels have been spoken of; but it appears that such jurisdiction as the court exercises in the case of unique chattels it may also exercise in the case of chattels which, though not unique, possess a special and peculiar value to the plaintiff. Thus in North v. The Great Northern Railway Co.(*r*) the court upheld its jurisdiction to interfere to prevent the sale of certain wagons belonging to the plaintiff, which had been used by the plaintiff in his business of a colliery owner, and which the defendants asserted that they had a right to detain and sell. "Where specific things," said Stuart, V. C.,(*s*) "necessary for conducting a particular business are in the possession of persons who claim a lien upon them, and threaten an immediate sale, this court has undoubted jurisdiction to interfere by injunction and prevent irreparable injury to the debtor by giving him an opportunity of redeeming assets."

§ **63**. So, too, there is the high authority of Lord Hardwicke for suggesting that specific performance might be maintained by a shipbuilder if he were to contract with a landowner for the supply of timber from an adjoining estate, the shipbuilder being under contract to complete a ship by a given time, for which the supply of such timber by the defendant was essential. But this will not be extended to mere questions of convenience, as the supply of coal from an adjoining colliery, when plenty of other coal can be procured in the neighborhood;(*t*) at any rate it is believed that there is no reported case in which such a proceeding has actually been maintained.

§ **64**. Cases might probably arise in which the court would

(*q*) Dowling v. Betjemann, 2 J. & H., 544.
(*r*) 2 Giff., 64.
(*s*) Page 69.
(*t*) Per Lord Hardwicke in Buxton v. Lister, 3 Atk., 383, compared with Pollard v. Clayton, 1 K. & J., 462, and cf. Fothergill v. Rowland, L. R. 17 Eq., 132.

interfere in respect of chattels connected with the enjoyment of an estate, where but for such connection it would not exercise jurisdiction. In one case Lord Eldon made an order specifically to restore to a tenant the stock on a farm, which had been seized by the landlord under a distress and bill of sale; his lordship holding that, under the circumstances of that case, there was an entire contract by which the landlord agreed to let the tenant have both the estate and the chattels, the enjoyment of the chattels being requisite for the enjoyment of the estate.(*u*)

§ **65**. This appears to have been one ground on which the court of chancery anciently enforced contracts to build in certain cases; as where the father entered into articles with a builder, and died before the execution of the contract, the heir was allowed to sue the personal representative of his father and the builder, the contract savoring of the realty.(*v*) So, in another case, a contract to build was specifically enforced against a tenant who, having undertaken to rebuild the farm-house, had done so on his own soil instead of his landlord's.(*w*) And we shall hereafter(*x*) see that contracts by railway companies for the execution of works on the land of the plaintiff stand on a different footing from ordinary building contracts.

§ **66**. From specific performance in respect of chattels must be discriminated the cases where a trust has been constituted in respect of such property; for the nature of the subject-matter is no obstacle to the interference of the court to compel execution of the trust, whether it be one constituted by direct declaration, or a constructive trust arising from the act of the parties.(*y*)[1] The court will accordingly

(*u*) Nutbrown v. Thornton, 10 Ves., 159.
(*v*) Holt v. Holt, 2 Vern., 322; per Lord Hardwick in Rook v. Warth, 1 Ves. Sen., 461.
(*w*) Pembroke v. Thorpe, 3 Sw., 437, n.
(*x*) Infra, § 61 et seq.
(*y*) Wood v. Rowcliffe, 3 Ha., 304; S. C., 2 Ph., 382; Pooley v. Budd, 14 Beav., 34.

[1] The exercise of equity jurisdiction does not proceed upon any distinction between real estate and personal estate, but upon the ground that damages at law may not afford a complete remedy. Thus courts of equity well decree performance of a contract for land, not because of the particular nature of the land, but because the damages at law, which must be calculated upon the general value of the land, may not be a complete remedy to the purchaser, to whom the land purchased may have a peculiar and special value. So courts of equity will not generally decree performance of a contract for the sale of stock or goods; not because of their personal nature, but because the damages at law, calculated upon the market price of the stock or goods, are as complete a remedy for the purchase, as the delivery of the stock or goods contracted for;

restrain improper dealings by an agent with chattels, though they may be of no peculiar or intrinsic value.(*z*)

§ **67**. Lord Hardwicke seems to have entertained the view that where the contract was for the delivery of chattels by installment and for payment in a like method, the court would entertain jurisdiction.

In a case cited by his lordship, articles for the sale of eight hundred tons of iron, to be paid for by installments, at periods running through some years, were specifically enforced.(*a*) The case appears to have been, as already stated, approved by his lordship, but was doubted by Lord Hatherley (when V. C.), who remarked on the absence of any case for the sale of mere goods being supported on the ground of their being to be delivered by installments.(*b*) Mr. Austin, too, has expressed his inability to understand on what principle the case proceeded,(*c*) and a like inability is here confessed.

4. *Where the contract is such as the court cannot perform.*

§ **68**. Where the contract is, from its nature, such that the court cannot enforce its performance,(*d*) it is necessarily no subject of its jurisdiction in that respect.(*e*)

§ **69**. On this principle the court will not prohibit the making of a secret medicine; for, if it be secret, then the court cannot tell whether it has been infringed or no;(*f*) nor, for the same reason, will it direct the specific performance of covenants in a farming lease, for "how," said Lord Northington, "can a master judge of repairs in hus-

(*z*) Wood v. Rowcliffe, *ubi supra*.
(*a*) Taylor v. Neville, cited 3 Atk., 384. Distinguish Nives v. Nives, 15 Ch. D., 649.
(*b*) Pollard v. Clayton, 1 K. & J., 462.
(*c*) Jurisprudence, 808.
(*d*) As to uncertainty in contracts see Part III, ch. 4, infra.
(*e*) Consider Hope v. Gibbs, 26 W. R., 72; De Mattos v. Gibson, 4 De G. & J., 276, 299.
(*f*) Newberry v. James, 2 Mer., 446; Williams v. Williams, 3 id., 157; and see the other cases cited in the note to § 1516, infra.

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inasmuch as with the damages he may ordinarily purchase the same quantity of the like stock or goods. Story's Eq. Jur., § 717. It was upon this distinction that the decision in Clark v. Flint, 22 Pick., 231, is based. It was there held, that, where the owner of a brig had contracted, in writing, for a valuable consideration, to hold the vessel in trust for another, and subject to his order and disposition, and then sold her to another person, with notice of the contract, specific performance might be enforced, in case of the insolvency of the original contractor, since a judgment at law against an insolvent person would not be an adequate remedy. It is a point too well settled to admit of much doubt, that where a trust has been created in relation to particular chattels, by contract, a bill in equity will lie to enforce the trust and have a transfer of the property. Cowles v. Whitman, 10 Conn., 121, which was a case of a trust in bank shares. See the dictum in Ferguson v. Paschall, 11 Miss., 267.

bandry?"(*g*)[1] Nor will it enforce against a life assurance society a contract to reduce a premium if satisfied with the removal of the cause for charging an extra premium, for it is the society and not the court which is to be satisfied ;(*h*) nor will it order the performance of continuous acts.(*i*) And the fact that the parties cannot be put in the condition for which they stipulated when the contract was entered into, obviously disables the court from adjudging specific performance.(*j*)

§ **70**. And so, too, the court will not interfere to enforce a contract by means of injunction, where the acts complained of as breaches are frequent, and the court could not ascertain whether there has, in each case, been a breach without an action ; as in the case of a covenant not to sell water from a certain well to the plaintiff's injury.(*k*)

§ **71**. The incapacity of the court to execute the contract limits its jurisdiction in cases relating to the sale of the goodwill of a business.[2] For where the contract has respect to a goodwill alone, unconnected with business premises, the court refuses specific performance by reason of the uncertainty of the subject matter, and the consequent incapacity of the court to give specific directions as to what is to be done to transfer it.(*l*) But where the goodwill is

(*g*) Rayner v. Stone, 2 Eden, 128. Cf. Bernard v Meara, 12 Ir Ch. R., 389, 396.
(*h*) Manby v. Gresham Life Assurance Society, 29 Beav , 439
(*i*) Blackett v. Bates, L. R. 1 Ch., 117; Powell Duffryn Steam Coal Co. v. Taff Vale Railway Co., L. R. 9 Ch., 331.
(*j*) Re Mercantile and Exchange Bank, L. R. 12 Eq., 263, 276.
(*k*) Collins v. Plumb, 16 Ves., 454. See, also, City of London v. Nash, 3 Atk , 512, 515.
(*l*) Baxter v. Conolly, 1 J. & W., 576; Bozon v. Farlow, 1 Mer., 459; Coslake v. Till, 1 Russ., 376.

[1] Under this head may be ranked contracts to do purely personal acts. It may be laid down that equity never enforces these contracts unless they have some reference to property of some kind, or a partnership of some nature. In England, equity will interfere *negatively*, that is, by injunction. Although the court could not carry out the *positive* part of the agreement; which, in Lumley v. Wagner, 1 De G. M. & G., was an engagement to sing at a theatre; the court preventing the singer from performing elsewhere. But in New York at least there are no cases of this kind where the court has interfered either actively or negatively. Haight v. Badgley, 15 Barb. Sup. Ct., 501; Hamblin v. Dunneford, 2 Edw. Ch., 522; De Rivafinoli v. Corsetti, 4 Paige, 261; Sanquirico v. Benedetti, 1 Barb. Sup. Ct., 315. Where property is concerned, the rule is different. Stuyvesant v. The Mayor of New York, 11 Paige, 414. In regard to contracts relating to partnerships the English rule, as established in Morris v. Coleman, 18 Ves., 437; Clark v. Price, 2 Wilson, 157, and Kemble v. Kean, 6 Sim., 333, has never been controverted.

[1] Equity will interpose to prevent a party from setting up a business or profession in opposition to his agreement, notwithstanding he has agreed not to do so under a penalty, and has paid the penalty. Roper v. Upton, 125 Mass., 258; Dooley v. Watson, 1 Gray, 414; Hardy v. Martin, 1 Cox, 26.

entirely or mainly annexed to the premises, and the contract is for the sale of the premises and goodwill, the contract may be enforced.(*m*) For in that case the goodwill is merely the advantage attached to the possession of the house or other place of business,(*n*)—"the probability," to use the words of Lord Eldon,(*o*) "that the old customers will resort to the old place"—together with the right which arises to the purchaser to restrain the vendor from setting up anew, or continuing, the identical business he has contracted to sell, but without any right, independently of stipulation, to prevent the vendor's setting up a similar business.(*p*) In the case of contracts for the sale of the business of an attorney, the legality of stipulations comprised in them, for the purpose of giving to the party to carry on business the advantage of the name or of the recommendation of the party not engaged in it, has been questioned by the highest authorities, including Lord Eldon; Grant, M. R., and Knight Bruce, L. J.(*q*) But it seems to be now established, not only that such transactions are legally valid,(*r*) but that they may be specifically executed, by injunction or otherwise, by the court.(*s*)

5. *Where the performance of the contract would be useless.*

§ **72.** The court will not enforce a contract which is in its nature revocable by the defendant; for its interference in such a case would be idle, inasmuch as what it had done might be instantly undone by one of the parties.[1]

Thus where the registrar of a consistory court agreed to grant a deputation of his office, it was held that such a

(*m*) Darbey v. Whittaker, 4 Drew., 134, 139, 140.

(*n*) Chissum v. Dewes, 5 Russ., 29; Mummery v. Paul, 1 C. B., 316, 326; and see further, as to the nature of a goodwill, Potter v. Commissioners of Revenue, 10 Ex., 147; Allison v. Monkwearmouth, 4 El. & Bl., 13, and Lindley, Partn., 884 (3d ed).

(*o*) In Cruttwell v. Lye, 17 Ves., 346.

(*p*) Cruttwell v. Lye, 17 Ves., 335; Shackle v. Baker, 14 id., 468. Cf. Leggott v. Barrett, 15 Ch. D., 306.

(*q*) Per Lord Eldon in Candler v. Carden, Jac., 231; Bozon v. Farlow, 1 Mer., 459; Thornbury v. Bevill, 1 Y. & C. C. C., 584. See Gilfillan v. Henderson, 2 Cl. & Fin., 1.

(*r*) Bunn v. Guy, 4 East, 190.

(*s*) Whittaker v. Howe, 3 Beav., 383; Aubin v. Holt, 2 K. & J., 66.

[1] Thus, while equity will sustain a post nuptial voluntary settlement in favor of the wife, when executed, and will specifically enforce, as against any other person than the party himself, an agreement to make such a settlement, it will refuse to execute such an agreement against the party himself, because, until executed, it is revocable. Andrews v. Andrews, 28 Ala., 432.

deputation was in its nature revocable, and, therefore, could not be enforced by the court.(*t*)[1]

§ **73**. It is on the same principle that the court generally refuses to interfere in cases of contracts to enter into partnership which do not specify the duration of the partnership —that relation, unless otherwise provided, being dissoluble at the will of either party.(*u*) There is indeed some authority to the contrary of this proposition, consisting of a dictum of Lord Hardwicke's(*v*) in general terms, and two or three cases(*w*) in which specific performance of such contracts seems to have been enforced, but with regard to which it does not appear whether the partnerships thus constituted were for a term or not; and it is indeed said that Lord Eldon was not quite satisfied with his decision in the case quoted as establishing the principle.(*x*)[2]

§ **74**. The doctrine, however, appears to be generally accepted as that of the court. Thus in a case before Lord Romilly, M. R., the principle was acted on: the defendant entered into a contract with the plaintiff company to take a certain number of shares and to execute the deed of settlement when required; and of this contract the court refused specific performance, because the defendant might, by the rules of the company, have ceased again to be a partner within fourteen days after becoming such.(*y*)

§ **75**. It is on the same reasoning that the court declines to perform a contract to execute an instrument if such covenants must be introduced into the instrument that the party resisting the performance may immediately take advantage

(*t*) Wheeler v. Trotter, 3 Sw., 174, n. See, also, Sturge v. Midland Railway Co., 6 W. R., 233 (Stuart, V. C.).

(*u*) Hercy v. Birch, 9 Ves., 357. See further, infra, §§ 824, 1512 et seq., and cf. Firth v. Ridley, 33 Beav., 516, 521.

(*v*) In Buxton v. Lister, 3 Atk., 385.

(*w*) Anon., 2 Ves. Sen., 629; Anon., 1 Mad. Ch., 411, n.; Hibbert v. Hibbert, Coll., Partn., 133.

(*x*) 1 Mad. Ch., 411, n.

(*y*) Sheffield Gas Consumers' Co. v. Harrison, 17 Beav., 294; cf. Bluck v. Mallalue, 27 id., 398, 405. Distinguish Odessa Tramways Co. v. Mendel, 8 Ch. D., 235, and cf. New Brunswick and Canada Railway Co., Limited, v. Muggeridge, 30 L. J. Ch., 247. See, also, as to contracts to form a company, Stocker v. Wedderburn, 3 K. & J., 393.

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[1] Where the contract is revocable at the pleasure of the party making it, specific performance will not be decreed; it would be an idle exercise of the power of the court. Express Co. v. R. R. Co., 9 Otto, 191.

[2] Meason v. Kaine, 63 Pa. St., 335; Birch v. Smith, 29 Mich., 166. Where, by the partnership agreement a party has an interest in property, such interest will be secured to him. Somerly v. Buntin, 118 Mass., 279. The terms of the partnership must, however, have been distinctly settled for a definite time. Wilson v. Campbell, 10 Ill., 383; Whittorth v. Harris, 40 Miss., 483; England v. Curling, 8 Beav., 129.

of them to deprive the other of all benefit under the instrument; as, for instance, a contract for a lease which is to contain a proviso for re-entry on breach of a covenant, which the plaintiff has already broken.(*z*)

6. *Where the court would be unable to enforce its judgment.*

§ **76**. In some old cases the court of chancery entertained suits in respect of building contracts; and what has been considered one of the earliest traces of the jurisdiction in specific performance is a dictum of Genney, J., in the 8 Edward IV, that a promise to build a house would be specifically enforced.(*a*) Lord Hardwicke also maintained this view of the jurisdiction of the court.(*b*) But it is now clearly settled that, subject to certain exceptions, the court will not specifically enforce contracts to build or repair,(*c*) both because specific performance is "decreed only where the party wants the thing in specie and cannot have it any other way,"(*d*) and because such contracts are for the most part so uncertain that the court would be unable to enforce its own judgment.(*e*)[1]

(*z*) Per Grant, M. R., in Jones v. Jones, 12 Ves., 188.

(*a*) See supra, § 19.

(*b*) Buxton v. Lister, 3 Atk., 385; City of London v. Nash, id., 512; S. C., 1 Ves. Sen., 12. See, also, Allen v. Harding, 2 Eq. C. Abr., 17.

(*c*) Paxton v. Newton, 2 Sm. & Gif., 437; Kay v. Johnson, 2 H. & M., 118; Whertley v. Westminister Brymbo Coal Co., L. R. 9 Eq., 538.

(*d*) Per Lord Kenyon, M. R., in Errington v. Aynesly, 2 Bro. C. C., 343; S. C., 2 Dick. 692. Accordingly Lucas v. Commerford, 3 Bro. C. C., 166

(*e*) Mosely v Virgin, 3 Ves., 184; cf. Greenhill v. Isle of Wight (N. J.) Railway Co., 19 W. R., 345; Bernard v. Meara, 12 Ir. Ch. R., 389, 397.

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[1] *Building contracts.*] The rule is now well settled, that contracts for building will not be specifically enforced. Lord Kenyon said in Errington v. Aynesley, 2 Bro. C. C., 343: "There is no case of a specific performance decreed of an agreement to build a house, because if A. will not do it, B. may. A specific performance is only decreed where the party wants the thing in specie and cannot have it in any other way." See, also, Wilkinson v. Clements, L. R., 8 Ch., 96; City of London v. Southgate, 38 L. J. C., 141; Martin v. Hally, 61 Mo., 196; Ross v. Union Pacific R. R. Co., 1 Woolw., 26. In Scotland, the court will sometimes appoint a suitable person to superintend the work, when it orders specific performance of a building contract. Clark v. Glasgow Asso. Co., 1 McQueen, 668.

Example of building contracts which were enforced, and rule.] A. agreed to sell land to B., and to construct a road, allowing A. to use the same. B. was to erect a house on the land at a definite price. Held, that such contract would be specifically enforced. Wells v. Maxwell, 32 Beav., 408; aff'd, 9 Jur. (N. S.) 1021. A tenant agreed to rebuild a farm-house, but did so upon his own land instead of upon his landlord's. Held, that specific performance would be decreed. Pembroke v. Thorpe, 3 Swanst., 437, note. In Shorer v. Gt. Western R. R. Co., 2 Y. & C. C. C., 48, it was held, that a railroad company having agreed to do so, would be compelled to construct and maintain an archway under their line, connecting lands of plaintiff severed by the road. In Sanderson v. Cockermouth and Workington R. R. Co., 11 Beav., 497, that the

§ **77**. For the first of the reasons stated, Grant, M. R., refused specific performance of a covenant to make good a gravel-pit;(*f*) on the ground of both of these reasons, specific performance was refused in a case of a contract for the construction of a branch railway, which was entered into during the pendency of the bill before Parliament, and when several of the directors had thoughts of withdrawing the bill, and, as the plaintiffs alleged, would have done so, but for the contract in question;(*g*) and in other cases, specific performance has been refused of contracts for the working of quarries,(*h*) and coal mines,(*i*) or involving the performance of continuous acts or duties.(*j*)

§ **78**. In the case of Brace v. Wehnert (*k*) decided by Lord Romilly, M. R., in March, 1858, the contract was that A. should grant a lease to B. as soon as B. should have built a house of the value of £1400, according to a plan to be submitted to and approved by A., and B. agreed to build and take the lease; no plan had been approved; a bill filed by A. against B. was dismissed, with costs. In like manner a contract by a landlord to execute repairs upon a farm was not enforced.(*l*)[1]

(*f*) Flint v. Brandon, 8 Ves., 159.
(*g*) South Wales Railway Co. v. Wythes, 1 K. & J., 186; S. C., 5 De G. M. & G., 880; Greenhill v. Isle of Wright (N. J.) Railway Co., 19 W. R., 345.
(*h*) Booth v. Pollard, 4 Y. & C. Ex., 61.
(*i*) Pollard v. Clayton, 1 K. & J., 462.
(*j*) Blackett v. Bates, L. R. 1 Ch., 117; Powell Duffryn Steam Coal Co. v. Taff Vale Railway Co., 1d., 9 Ch., 331.
(*k*) 25 Beav., 348. Note that this case was decided before the passing of Lord Cairns' Act. Consider Asylum for Female Orphans v. Waterlow, 16 W. R., 1102.
(*l*) Norris v. Jackson, 1 J. & H., 319.

railroad company must construct such roads through the land divided, as would be necessary to connect the several portions. A. agreed, in writing, to partiailly erect sixteen houses, and, upon completion, was to receive a deed of three of the same. Having performed his part of the contract, the court deemed specific performance, that a deed in fee simple should be given, with a covenant against incumbrances. Ellis v. Burden, 1 Ala., 458. A railroad company purchased land, upon the terms that they would construct a road and wharf. Held, that they must do so. Wilson v. Furners R. R. Co., L. R., 9 Eq., 28. In Lytton v. Gt. Northern R. R. Co., 2 K. & J., 394, the road agreed with the owner of land to construct and maintain a siding—Held, that specific performance would be enforced. The same rule was applied with regard to building and maintaining a station "in all respects first-class." Hood v. Northeastern R. R. Co., L. R., 8 Eq., 666. Where the plaintiff has a material interest in its execution, and the work to be done is clearly defined, and where he cannot be adequately compensated in damages, specific performance will be decreed. Story's Eq. Juris., § 728; Mosely v. Virgin, 3 Ves., 184; Stuyvesant v. Mayor of N. Y., 11 Paige Ch., 414.

[1] *Specific performance as to repairs.*] With rare exceptions, covenants to repair will not be specifically decreed, there being an ample remedy at law. This was held in a case where the lessor agreed, in his lease, to repair damages caused by fire. Beck v. Allison, 56 N. Y., 367; City of London v. Marsh, 3 Atk., 512; Lord Abinger v. Ashton, L. R., 17 Eq., 376; Hill v. Barcley, 18 Ves., 59. In

§ **79**. But, since Lord Cairns' Act (21 and 22 Vict., ch. 27), it has been held that where the contract is for the building of a house, and, also, for the grant and acceptance of a lease, the court can grant specific performance of the contract to accept the lease and give damages for the non-building of the house.(*m*)

§ **80**. There are, as already hinted, exceptional cases of building contracts in respect of which the court will interfere. Lord Rosslyn, in a judgment which appears never to have been overruled, maintained that where a contract for building is in its nature defined, the court might, without much difficulty, entertain a suit for its performance.(*n*) Mr. Justice Story argues in support of this view,(*o*) and in Cubitt v. Smith,(*p*) Stuart, V. C., acted upon it.[1] It may also be added that in Scotland many contracts to build are specifically performed, in respect of which the court would decline jurisdiction in England, the Scotch courts appointing some properly qualified person, under whose superintendence the work is directed to be executed.(*q*)

§ **81**. But whether the court will, or will not, interfere to enforce all such contracts when definite, it appears to be settled that it will assume jurisdiction where we have the following three circumstances: first, that the work to be

(*m*) Soames v. Edge, Johns., 669; Mayor, etc., of London v. Southgate, 17 W. R., 197; 38 L. J. Ch., 141.
(*n*) Mosely v. Virgin, 3 Ves., 184.
(*o*) Eq. Juris., § 728.
(*p*) 10 Jur. (N. S.), 1123.
(*q*) Clark v. Glasgow Assurance Co., 1 M. Qu., 668.

Hughes v. Metropolitan R. R. Co., 46 L. J. C., 583, the lessee covenanted to repair after notice; the lessor gave notice, and afterwards waived the default of the lessee by continuing to negotiate. Held, that the court would relieve against the forfeiture. An agreement was made that a lease should be executed containing a covenant to repair. Held, that specific performance of such agreement would be decreed, so as to give a remedy for not repairing. Volloton v. Seigrett, 2 Abb. Pr., 121. See as to improvements made by lessor. Berry v. Van Winkle, 2 N. J. Eq., 1 Greene, 269.

[1] There seems to be considerable doubt on this point. See Story's Eq. Jur., §§ 726, 727. As to the specific performance of covenants to repair, see Rayner v. Stone, 2 Eden, 128; Hill v. Barclay, 16 Ves., 405. In Lucas v. Commerford, 10 Ves., 235, the court was of opinion that the contract, which was one to build, should not be enforced. But it appears that the agreement was, in in every respect, too uncertain and undefined to be made the subject of a master's report. See note [2] to Lucas v. Commerford, 1 Ves. (Sumner's ed.) Birchett v. Bolling, 5 Mun., 442, is an authority on this point In that case, a contract to build a tavern, at the joint risk and expense, and for the joint benefit of the parties, was decreed to be specifically performed, at the instance of one of them, who had furnished the land to be built upon, and performed his part of the agreement, the others objecting, on the ground that a change of circumstances rendered the scheme unadvisable.

done is defined; secondly, that the plaintiff has a material interest in its execution, which cannot adequately be compensated for by damages, and thirdly, that the defendants have by the contract obtained from the plaintiff possession of the land on which the work is to be done. Thus the court has in numerous cases (*r*) enforced on railway companies contracts to make and maintain works for the convenience of the lands of the plaintiff. It has done this in cases in which the terms of the contract have been general and difficult to execute.

§ **82**. In one of these cases a contract by the company to construct and maintain, upon land belonging to and to be provided by a landowner, a siding of specified length alongside the line, was held capable of specific performance; and the company were not allowed to resist performance on the ground that the plaintiff had, before filing his bill, entered into a negotiation (which failed) for a money compensation.(*s*)

§ **83**. In another case the plaintiff had sold lands to the defendants, a municipal corporation, who by the deed of sale covenanted forthwith to make a road and erect a market-house on the land. They entered and made the road, but neglected to build the market-house. Wigram, V. C., observed that the defendants having had the benefit of the contract in specie, the court would go any length that it could to compel them to perform their contract in specie.(*t*)

§ **84**. In this case, as in the railway cases previously quoted, the plaintiff having parted with the land, had no opportunity of doing the work which the defendants had contracted to do, and so ascertaining the amount of damages sustained by their non-performance; (*u*) but though part-performance has to this extent been held important, it must be borne in mind that it will in no case enable the court to

(*r*) Storer v. Great Western Railway Co., 2 Y. & C. C. C., 48; Saunderson v. Cockermouth and Workington Railway Co., 11 Beav., 497; Lord Darnley v. London, Chatham and Dover Railway Co., 1 De G. J. & S., 24; 3 id., 24; L. R. 2 H. L. 43; Sir E. B. Lytton v. Great Northern Railway Co., 2 K. & J., 394; Wilson v. Furness Railway Co., L. R. 9 Eq., 28; Hood v. North Eastern Railway Co, id., 5 Ch., 525; cf. Wilson v. Northampton and Banbury Junction Railway Co., L. R. 9 Ch, 279.

(*s*) Greene v. West Cheshire Railway Co., L. R. 13 Eq, 44.

(*t*) Price v. Corporation of Penzance, 4 Ha., 506. See, also, Pembroke v. Thorpe, 3 Sw., 437, n.; Oxford v Provand, L. R. 2 P. C., 135.

(*u*) Per Lord Hatherley (then Wood, V. C.) in South Wales Railway Co. v. Wythes, 1 K. & J., 200.

intervene where it has no jurisdiction in the original subject-matter of the contract.(*v*)[1]

§ **85**. Where the act alleged as part-performance is one proper to be brought before a jury, and can be answered in damages, non-performance of the rest of the contract does not constitute that fraud which is the origin of the court's jurisdiction in cases of part-performance in this respect, as well as when treated as an exception to the Statute of Frauds.(*w*)

§ **86**. In one case Lord Eldon, though expressing a difficulty in decreeing repairs to be done affirmatively, yet by means of an injunction in fact granted performance of a covenant to keep a canal and its stopgates in repair for the benefit of the lessee of a mill interested in them.(*x*)

7. *Where the enforced performance of the contract would be worse than its non-performance.*

§ **87**. The relation established by the contract of hiring and service (*y*) is of so personal and confidential a character that it is evident that such contracts cannot be specifically enforced by the court against an unwilling party with any hope of ultimate and real success; and accordingly the court now refuses to entertain jurisdiction in regard to them.(*z*)

§ **88**. In former times this seems to have been otherwise. In a case decided by Lord Cowper and the House of Lords, there was a contract by which a skilled person had bound himself to serve during his life as manager and overseer to a company engaged in the manufacture of brass, and the company had agreed to pay him a certain salary and 3*s*. 6*d*.

(*v*) Kirk v. Bromley Union, 2 Ph., 640, 648; Crampton v. Varna Railway Co., L. R. 7 Ch., 562.

(*w*) South Wales Railway Co. v. Wythes, 1 K. & J., 186; and see infra, § 562 et seq.

(*x*) Lane v. Newdigate, 10 Ves., 192.

(*y*) See per Jessel, M. R., in Rigby v. Connol, 14 Ch. D., 487.

(*z*) See Ghillis v. McGhee, 13 Ir. Ch. R., 48, 57; White v. Roby, 26 W. R., 133. In Rigby v. Connol, 14 Ch. D., 487, the opinion appears to have been intimated by Jessel, M. R., that the fact of there being no property, the right to which is taken away from the person complaining, lies at the root of the court's non-interference in respect of contracts strictly personal in their nature.

[1] In a very similar case—where the city of New Haven had agreed to buy of the plaintiff certain lands, and as much of the water of Mill river as should be necessary to supply that city with pure water, for the consideration of $50,000, and of the covenant to construct a costly dam, and a canal to convey, for the plaintiff's use, the surplus water of said river—specific performance was refused, upon the ground that he had never parted with the possession of the property, and, consequently, that he had the means of complete redress at law. Whitney v. New Haven, 23 Conn. R., 624.

for every hundred-weight of brass wire made by him or any other person for them during his life; on a bill by the manager, Lord Cowper decreed the payments according to the articles for past services, and specific performance of them for the future, by the plaintiff again repairing to the works and acting according to the articles, if the defendants should require the same. The appeal from this decree to the House of Lords was by the plaintiff on a point of the construction of the contract as to the 3*s.* 6*d.* per cwt., which resulted in a modification of the decree according to his contention.(*a*) And in another case Lord Hardwicke specifically enforced a contract by the East India Company to employ a man as a packer.(*b*)

§ **89**. But the difficulty of enforcing such contracts in specie is now admitted by the court. Thus, in a case where the plaintiffs had contracted for a specified sum to work the line of a railway company and to keep the engines and rolling stock in repair, the court, considering this to be a contract for services, refused to enforce it.(*c*) "We are asked," said Knight Bruce, L. J.,(*d*) "to compel one person to employ against his will another as his confidential servant, for duties with respect to the due performance of which the utmost confidence is required. Let him be one of the best and most competent persons that ever lived, still, if the two do not agree, and good people do not always agree, enormous mischief may be done."

§ **90**. So in an earlier case a grant having relation to an office of a personal and confidential character, was held to be incapable of being specifically enforced;(*e*) in another instance, where an indenture was held to constitute the relation of master and servant, and not of partner, Lord Truro dissolved an injunction which had been previously granted, restraining the defendant from excluding the plaintiff from the management of the business;(*f*) and in another case, where a contract by the plaintiff to employ the defendant as manager of a business formed part of a contract by which

(*a*) Ball v. Coggs, 1 Bro. P. C., 140. This case involves the validity of contracts of service for life; as to which see, also, Wallis v. Day, 2 M. & W., 273.

(*b*) East India Co v. Vincent, 2 Atk., 83.

(*c*) Jonnson v. Shrewsbury and Birmingham Railway Co., 3 De G. M. & G. 914. See, too, Horne v. London and North Western Railway Co., 10 W. R., 170.

(*d*) Page 926.

(*e*) Pickering v. Bishop of Ely, 2 Y. & C. C. C., 249.

(*f*) Stocker v. Brocklebank, 3 Mac. & G., 250; cf Webb v. England, 7 Jur. (N. S.), 153; 9 W. R., 183; 30 L. J. Ch., 222.

the defendant agreed to grant to the plaintiff a lease of a wharf, specific performance was refused on the ground of want of mutuality.(*g*)

§ **91**. In like manner the court cannot enforce contracts of agency; as has been illustrated in the cases of contracts to employ a shipping-broker(*h*) and auctioneer.(*i*)[1]

8. *Where the contract is voluntary.*

§ **92**. The court will never lend its assistance to enforce the specific execution of contracts which are voluntary, or where no consideration emanates from the party seeking performance,(*j*) even though they may have the legal consideration of a seal; and this principle applies, whether

(*g*) Ogden v. Fossick, 4 De G. F. & J., 421; cf Stocker v. Wedderburn, 3 K. & J., 393; Firth v. Ridley, 33 Beav., 516.
(*h*) Brett v. East India and London Shipping Co., Limited, 2 H. & M., 404
(*i*) Chinnock v. Sainsbury, 30 L. J. Ch., 409.
(*j*) Groves v. Groves, 3 Y. & J., 163; Houghton v. Lees, 1 Jur. (N. S.), 862 (Stuart, V. C.); Ord v. Johnston, Id., 1063, 4 W. R., 37, Id.; Walrond v. Walrond, Johns., 18; Kennedy v. May, 11 W. R., 358. See, too, per Lord Eldon in Penn v. Lord Baltimore, 1 Ves. Sen., 450, and distinguish Cheale v. Kenward, 27 L. J. Ch., 784.

[1] *Specific performance of contracts for personal service.*] Contracts of hiring and service, notwithstanding their difficulty of being carried out, were formerly specifically enforced by courts of equity. East Ind. Co. v. Vincent, 2 Atk., 83; Ball v. Coggs, 1 Bro. P. C., 140. The rule, however, appears now to be well settled, that specific performance of a contract involving personal service, special ability or confidence, will not be decreed: and that a party will not be enjoined from terminating such a contract, the following are examples: The court refused to decree specific performance; to report law cases. Clark v. Price, 2 J. Wills., 157. To furnish drawings for maps. Baldwin v. Useful Knowledge Soc., 9 Lim., 393. To perform at a theatre. Lumley v. Wagner, 1 De G. M & G., 604; Fredericks v. Myer, 13 How. Pr., 566; Butler v. Galetti, 21 id., 465; Montague v. Flockton, L. R., 16 Eq., 189. In Pennsylvania, it has been very lately held, that a court of equity would not enforce the personal services of an actor, and would not enjoin him from performing at another theatre. Ford v. Germon, 6 Phila., 6. To do work as an apprentice, or to instruct as a master. Webb v. England, 29 Beav., 44. To work quarries or coal mines. Booth v. Pollard, 4 Y. & C. Ex., 61. Pollard v. Clayton, I. K. & J., 462. To work a line of railroad, and keep the rolling stock in repair. Johnson v. Shrewsbury, etc., R. R. Co., 3 De G. M. & G., 914.

Where the agreement is incapable of being enforced.] Specific performance will not be decreed, where the nature of the contract is such that it is out of the power of the court to enforce it; *e. g.*, it will not direct the conduct of the member of a firm in matters requiring his personal skill and judgment in the business of the firm. Buck v. Smith, 29 Mich., 166; Roberts v. Kelsey, 38 id., 602. Land was to be sold, provided the purchase money should be paid as might be agreed upon between the parties. Held, that equity could not compel the parties to agree. Hoff v. Shepherd, 58 Mo., 242; see, also, Atlanta R.R Co. v. Spear, 32 Ga., 550; Blanchard v. Detroit R.R.Co., 31 Mich., 43; Cincinnati R. R. Co. v. Washburn, 25 Ind., 259. A court of equity may, as a temporary measure during the pendency of a litigation, operate a railroad by a receiver. Coe v. Columbus R. R. Co., 10 Ohio St., 372; see Port Clinton R. R. Co. v. Cleveland R. R. Co., 13 Ohio St., 554; Richmond v. Dubuque R. R. Co., 33 Iowa, 422. A defendant will not be obliged to furnish marble from a quarry. Marble Co. v. Ripley, 10 Wall., 339; see Columbia Water Power Co. v. Columbia, 5 S. C., 225.

the contract insisted on be in the form of an executory agreement, a covenant, or a settlement.(*k*)[1] The peculiar

(*k*) Jeffreys v. Jeffreys, Cr. & Ph., 138; cf. Re King, 14 Ch. D., 186. Consider, too, Harvey v. Audland, 14 Sim., 531 See the Andrews v. Salt, L. R. 8 Ch., 622, 636, and older cases discussed in 1 Mad. Ch., 413, and Joyce v. Hutton, 12 Ir. Ch. R., 71.

[1] Grover v. Grover, 3 Y. & J., 163; Houghton v. Lees, 1 Jur. N. T., 862; Ord v. Johnson, id., 1063; Jeffreys v. Jeffreys, Cr. & Ph., 138; Moore v. Crofton, 1 Jones & Lat., 442; Kennedy v. Ware, 1 Pa. St., 445; Merser v. Stark, Walk. (Miss.), 451; Forward v. Armistead, 12 Ala., 124; Morris v. Lewis, 33 id., 53; Black v. Cord, 2 Har. & Gill., 100; Ormsby v. Hunton, 3 Bibb., 298; Darlington v. McCoole, 1 Leigh (Va.), 36; Bufford v. McKee, 1 Danna, 107; Holland v. Hindsley, 4 Iowa, 222; Shepherd v. Shepherd, 1 Md. Ch , 244; Vasser v. Vasser, 23 Miss., 378; Short v. Price, 17 Texas, 397; Tomlinson v. York, 20 id., 694; see, however, in this connection, Taylor v. James, 4 Dessau's Eq., 5; Cauldwell v. Williams. 1 Bailey's Eq., 175; McIntire v. Hughes, 4 Bibb., 186; Cabeen v. Gordon, 1 Hill (S C. Ch.), 51; Webb. v. Alton Ins. Co., 10 Ill., 225; Lear v. Chontean, 23 id., 39; Andrews v. Andrews, 28 Ala., 432; Hayes v. Kessow, 1 Sandf. Ch., 261; Burling v. King, 66 Barb., 633; Saunders v. Simpson, 2 Har. & Johns., 81; Wyche v. Green, 16 Ga., 49.

So long as it remains executory, equity will not assist in perfecting a voluntary agreement to create a trust. Holmes v. Holmes, 44 Ill., 168; Estate of Webb, 49 Cal , 542; Baylor v. Common, 40 Pa. St., 27.

Judicial sale.] The same reciprocal rights exist between the parties, whether the sale is judicial or private; in each case, the title being retained, specific performance will not be decreed unless a valuable consideration is paid, or offered, at or before the time of the decree. Burgin v. Burgin, 82 N. C., 196.

Illegal or void consideration] An executory contract will not be enforced, where it is founded upon an illegal or void consideration. Platt v. Maples, 19 La. An., 409; Paton v. Stewart, 78 Ill., 481; Butman v. Porter, 100 Mass., 337.

Voluntary deed lost] In Hodges v. Spicer, 79 N. C., 223, it was held that a court of equity would compel the grantor in a voluntary deed, to whom it was delivered for safe keeping after execution, and who had lost it, to execute another deed of like import.

The plaintiff must seek his redress at law, if he has an adequate remedy there. Coombe v. Meade, 2 Cranch, C. C , 547; Drew v Hains, 8 Ala., 438; Field v. Jones, 10 Ga., 229; Ross v. Buchanan, 13 Ill., 55; Kyle v. Frost, 29 Ind., 382; Smith v. Short, 11 Iowa, 523; Clayton v. Carey, 4 Md., 26; Bonebright v. Pease, 3 Mich., 318; Redmond v. Dickinson, 9 N. J., 507; Phyfe v. Wardell, 2 Ed. Ch , 47; Murdock v. Anderson, 4 Jones' Eq., 77; Keeler v. Levy, 26 N. J. Eq , 330; Marble Co. v. Ripley, 10 Wall., 339; Richmond v. Dubuque R. R. Co., 33 Iowa, 422; Deck's Appeal, 57 Pa. Stat., 467; Barnes v. Barnes, 65 N. C., 261; Noyes v. March, 123 Mass , 286. In Orr v. Brown, 5 Ga., 400, the purchaser at a sheriff's sale refused to take the property; it was resold for less. Held, that there was a sufficient remedy under the statute; the court would not compel specific performance by the first purchaser. Genl. Stat. Mass., ch. 113, § 2. Under this statute it was held that specific performance would not be granted, where, at the time of the filing the bill, the only obligation on the defendant's part to be enforced, was his express promise to pay a definite sum of money as an installment. Jones v. Newhall, 115 Mass., 244. The contract had been abandoned, and was unexecuted. Held, that there was a remedy at law in damages. *Quære;* Might it not also have been objected to the maintenance of a suit in equity, that the relief asked required of the court a superintendence of the construction of works of a special character, and to see that they were adequate to meet all requirements of the contract? Whitney v. New Haven, 23 Conn., 624. In Richardson v. Brooks, 52 Miss., 118, the plaintiff had a possible remedy at law, which had been rendered doubtful by the fraud of the defendant. Held, that this will not defeat the jurisdiction of a court of equity. A court of equity has no jurisdiction, where the action is to recover the value of a supposed interest in certain property, upon an alleged contract of the defendant to pay the same to the plaintiff. Stewart v. Mumford, 80 Ill., 192.

doctrines of the court as to the consideration which permeates (*l*) contracts in relation to marriage settlements must be borne in mind in relation to the foregoing statement.

§ **93**. In the case of contracts for the purposes of pleasure, scientific pursuits, charity, or philanthropy, it has been said (*m*) that "no court of justice can interfere, so long as there is no property the right to which is taken away from the person complaining."

9. *Where the plaintiff has elected to proceed in some other manner than for specific performance.*

§ **94**. Where a plaintiff proceeded at common law and recovered damages for breach of the contract, he could not afterwards sue in equity for its specific performance.(*n*) But, of course, it was not every proceeding at common law under a contract which barred its specific performance in equity.(*o*) This result was effected only where the legal and equitable relief were in respect of the same thing.

§ **95**. In Swinfen v. Swinfen,(*p*) Knight Bruce, L. J., seemed to think that the fact of applying to the court of common pleas for an attachment to enforce a contract to compromise would stand in the way of the applicant afterwards suing in chancery for performance of the same contract. And in Blackett v. Bates (*q*) Lord Cranworth intimated the opinion that a party to an award could not, after unsuccessfully taking proceedings to set it aside, insist on having it specifically performed. But in a case already referred to, a negotiation for the payment of a money compensation which went off was held not to be an election which precluded the relief in specific performance.(*r*)

§ **96**. In a case where a railway company was entitled to enforce a contract as to the sale of lands entered into by the defendant with the promoters of the company, the company first took proceedings under the lands clauses consolidation act for a compulsory purchase, then took compulsory possession of the land by virtue of a bond, and lastly

(*l*) Cf. infra, § 180, and Re D'Angibau, 15 Ch. D., 228, 242. Consider Lee v. Lee, 4 Ch. D., 175.

(*m*) Per Jessel, M. R., in Rigby v. Connol, 14 Ch. D., 487.

(*n*) Saunter v. Ferguson, 1 Mac. & G., 286; cf. Fox v. Scard, 33 Beav., 327.

(*o*) North v. Great Northern Railway Co., 2 Giff., 64.

(*p*) 2 De G. & J., 381, 391.

(*q*) L. R. 1 Ch., 126.

(*r*) Greene v. West Cheshire Railway Co., L. R. 13 Eq., 44.

filed their bill for specific performance of the contract. It was held that they had taken the benefit of sections of the lands clauses consolidation act to which they were not entitled if a binding contract subsisted, and their bill was dismissed.(*s*)

§ **97**. It is conceived that the principle embodied in the case last cited will continue to be observed by the supreme court.(*t*) But so far as the form of the proceedings is concerned, the right of claiming alternative(*u*) relief, and the wide powers of amendment(*v*) exercisable under the new practice, will in all proper cases enable a plaintiff to obtain relief by way of specific performance, provided that the facts proved and the rest of his claim as presented or insisted on at the trial are not inconsistent with such relief.(*w*)

10. *Where the jurisdiction has been taken away by statute.*

§ **98**. By section 47 of the fines and recoveries abolition act (3 and 4 W. IV., c. 74), the jurisdiction of courts of equity in regard to the specific performance of contracts is altogether excluded in cases of disposition of lands under that act by tenants in tail.(*x*)

11. *The jurisdiction is against the defendant personally.*

§ **99**. The jurisdiction in specific performance is against the person of the defendant on the equity arising from the contract. This principle is fertile in results.

§ **100**. One result is, that where the defendant is a person over whom the tribunals of this country have no jurisdisdiction, there can be no relief. Hence no specific performance can be awarded against a foreign government of a contract entered by such government with a private person.(*y*)

§ **101**. Another result of this principle is, that it constitutes no objection to specific performance, that the subject-matter with which the contract deals was not originally within the jurisdiction of the court, as the contract itself may give the court jurisdiction in specific performance, as

(*s*) Bedford and Cambridge Railway Co. v. Stanley, 2 J. & H., 746.
(*t*) See Thompson v. Ringer, W. N. 1881, 48, infra, § 1106.
(*u*) Ord. XIX, r. 8.
(*v*) Ord. XXVII, Ord. LVIII, r. 5.
(*w*) Cf. Cargill v. Bower, 10 Ch. D., 502, 508; Newby v. Sharpe, 8 Ch. D., 39.
(*x*) As to the specific performance of contracts to disentail, cf. Petre v. Duncombe, 7 Ha., 24; Dering v. Kynaston, L. R. 6 Eq., 210.
(*y*) Smith v. Weguelin, L. R. 8 Eq., 198.

well as in damages. The original jurisdiction in respect of the boundaries of our plantations in North America resided in the king in council; but a contract respecting them having been entered into between adjoining proprietors was held by Lord Hardwick to give the court jurisdiction;(*z*) and on the same principle, although the court has no jurisdiction in matrimonial causes, yet, where there has been a contract or covenant, it may interfere to enforce the execution of a proper separation deed, or to restrain the breach of a covenant contained in it.(*a*)

§ **102**. This introduces to our consideration the subject of foreign contracts.[1]

The general principle which regulates the place for the enforcement of contracts is, it is conceived, expressed in the maxim "*actio sequitur forum rei*."(*b*) It follows from this that a contract made abroad may be enforced against a defendant within the jurisdiction of this country, and as the remedies for breach of a contract are clearly governed by the *lex fori*, or law of the place where the action is brought,(*c*) it follows that it is no objection to the specific performance in England of a foreign contract that the foreign law might have given no such remedy.

Accordingly a marriage contract made in France was specifically executed here, the parties to it having come to this country as refugees.(*d*)

§ **103**. This jurisdiction is not confined to cases of contracts relative to personal property, but extends to those

(*z*) Penn v. Lord Baltimore, 1 Ves. Sen., 444 Consider Norris v. Chambres, 3 De G. F. & J., 583 (affirming S. C., 29 Beav., 246).
(*a*) Wilson v. Wilson, 1 H. L. C., 538; S. C., 14 Sim., 405; 5 H. L. C., 40.
(*b*) Davis v. Park, L. R. 8 Ch., 862.
(*c*) Story's Conflict of Laws, § 556.
(*d*) Foubert v. Twist, 1 Bro. P. C., 129.

[1] *Foreign contracts.*] Equity will decree specific performance of a contract, notwithstanding the subject was not originally within the jurisdiction of the court; the relief is not restricted to personal contracts, but extends to real estate when the parties reside within the jurisdiction, or are temporarily within such jurisdiction, and are served with process. Massie v. Watts, 6 Cranch, 158; Watkins v. Holman, 16 Pet., 25; Sutphen v. Fowler, 9 Paige's Ch., 280; Stainsburg v. Fringer, 11 Gill. & Johns., 149; Wood v. Warner, 15 N. J. Eq., 81; Olmey v. Eaton, 66 Mo., 563; Orr v. Quinn, 2 Law Repts. (N. C.), 465; Cleveland v. Burrell, 25 Barb., 532; Dooley v. Watson, 1 Gray, 414; McGreggor v. McGreggor, 9 Iowa, 65; Renn v. Hayward, 14 Ohio St., 302; see, however, Peter v. Worthington, 14 Ala., 584; Carter v. Jordon, 15 Ga., 76; Smith v. Iverson, 22 id., 190; Akin v. Lloyd, 28 Ill., 331; Birchard v. Cheever, 40 Vt., 94. In Wisconsin, in an action to enforce specific performance of a contract to convey land—Held, that the bill might be filed in any court in the State. Burrill v. Eames, 5 Wis., 260.

relative to real or immovable property, where the defendant is within the jurisdiction of the court. The maxim is "*Æquitas agit in personam*," and any operation of the judgment on the immovable estate abroad is not direct but indirect, and only through the medium of the person affected by the judgment. Thus, where Sir Philip Cartaret, the owner of the island of Sark, had mortgaged it, and a bill was brought against him by the mortgagee for foreclosure, a plea put in by the defendant that the island was not within the jurisdiction of the court of chancery was overruled.(*e*)[1]

§ **104**. But the court has been careful to confine its jurisdiction to relief arising strictly from privity of contract: it has nothing to do with rights arising from privity of estate in any other country.(*f*) So in Norris v. Chambres(*g*) the court declined to enforce a lien on foreign real estate, though the parties were residing here, and the defendant had taken the estate with notice of the contract from which the lien was sought to be raised.

§ **105**. It has been said by Mr. Justice Story,(*h*) that "the doctrine of the English courts of chancery on this head of jurisdiction seems carried to an extent which may perhaps in some cases, not find a perfect warrant in the general principles of international public law." And Lord Romilly, M. R., in the case last cited, adopting this remark, expressed his disposition not to go a step further than the cases warranted and demanded.(*i*)

§ **106**. It remains to notice a case in which the court of chancery granted relief with a view to specific performance against a defendant not within the jurisdiction.(*j*) In that

(*e*) Toller v. Carteret, 2 Vern., 494. See, too, Comes Arglasse v. Muschamp, 1 Vern., 75; Jackson v. Petrie, 10 Ves., 164; Lord Portarlington v. Soulby, 3 My. & K., 104, 108; Story Eq. Jur., § 743.

(*f*) Vincent v. Godson, 4 De G. M. & G., 546. See, too, the argument in Innes v. Mitchell, 4 Drew., 57, and the cases collected in the note, p. 99.

(*g*) 29 Beav., 246; 3 De G. F. & J., 583.

(*h*) Conflict of Laws, § 544 (2d ed.).

(*i*) See further, as to land in the Colonies, Re Holmes, 2 J. & H., 527; Sichel v. Raphael, 3 N. R., 662; Reiner v. Marquis of Salisbury, 2 Ch. D., 378; and cf. per Jessel, M. R., in Norton v. Florence Land and Public Works Co., 7 Ch. D., 335.

(*j*) Hart v. Herwig, L. R. 8 Ch., 860. Distinguish Rowney v. Alder, before Pollock, B., as Vacation Judge, 24 Sol. Jo , 807.

[1] It has been decided, in New York, that a court of equity may compel the specific performance of a contract to purchase land, though such contract was both made and to be performed, and the land lies within a foreign jurisdiction, provided that the defendant has been duly served with process and subjected to the jurisdiction of the court. Cleveland v. Burnell, 25 Barb., 532; Newborn v. Bronson, 3 Kern. (N. Y.), 587.

case Hart, a domiciled Englishman, agreed at Hamburg with Herwig, domiciled at Hamburg, for the purchase of a ship to arrive from San Francisco, for a certain sum liable in the event of certain damage to an abatement. The ship arrived in this country. The plaintiff claimed the abatement, the amount of which he alleged could be ascertained by a survey, which Herwig and the master refused, and declined to complete except on payment of the full price. The bill was against Herwig and the master, and prayed specific performance and an injunction against removing the ship. This injunction was granted by Malins, V. C., and upheld by James and Mellish, L. JJ. Their Lordships drew a distinction between an action for damages and the suit. If it had been the former, it was said that the action must have been in the forum of the defendant. "But where," said James, L. J., "the contract as in this case, though made abroad, is to deliver a thing in specie to a person in this country, and the thing itself is brought here, then the court here, in the exercise of its discretion, will see that the thing to be delivered in this country does not leave this country, so as to defeat the right of the plaintiff to have it so delivered."(*k*) The law thus laid down seems to create an exception to the general principle of international law, which requires the plaintiff to seek the defendant and to sue in his forum. The decision is remarkable, but it has the authority of three unanimous judges.

12. *Quasi-contracts in respect of which the court has jurisdiction.*

§ **107**. There is a class of quasi-contracts in respect of which the court entertains jurisdiction, viz.: where the relationship of vendor and purchaser is constituted by the exercise of those compulsory powers of railway and other companies which are conferred by the lands clauses consolidation act, 1845, and similar statutes. They are here called quasi-contracts, because when the proceedings are strictly under the statute there is an absence on the part of the man whose land is taken of that volition, which seems an essential element in all true contracts.

(*k*) Page 864.

§ **108**. It was at one time supposed that the mere notice to treat constituted the relation of vendor and purchaser to such an extent that a suit in equity could thereupon be maintained. But it is now well ascertained that such is not the case, and that though the notice constitutes the relation for certain purposes, such as that the particular lands to be taken are fixed, and that the company cannot get rid of the obligation to take nor the landowner of the obligation to give up these lands, yet that there is no contract between the parties and no ground for equitable intervention.(*l*)

§ **109**. After this notice is given, the act points out the method in which the purchase-money is to be ascertained. If the amount claimed do not exceed £50, it is to be settled by two justices; if it exceed £50 it is to be settled by arbitration if the landowner so require, but otherwise by a jury, to be summoned at the instance of the company.(*m*)

§ **110**. If after notice given the landowner refuse to convey, the company can proceed against him under their statutory powers, but have no ground for equitable relief; and conversely if after notice the company refuse to proceed, the landowner cannot, it is conceived, generally sue in equity; but he may apply for a mandamus to compel the company to proceed under the statute to ascertain the compensation money payable.(*n*)

§ **111**. There is one case,(*o*) however, in which jurisdiction was entertained by the court of chancery to enforce on the railway company proceedings under the lands clauses consolidation act. The question was how far a piece of land came within the definition of curtilage, so that if the company took any part they could be compelled to take the whole under section 92 of the lands clauses consolidation act. The company gave a notice to take the part; the plaintiff gave a counter-notice to take the whole; the company took possession of part, and the plaintiff thereupon filed his bill and obtained at the hearing a declaration that the company were liable to take the whole and a reference for title;

(*l*) Haynes v. Haynes, 1 Dr. & Sm., 426, where all the earlier cases are considered and classified. See, however, Marson v. London, Chatham and Dover Railway Co., L. R. 6 Eq., 101; 7 Eq., 546.

(*m*) Lands Clauses Consolidation Act, 1845, §§ 22, 23.

(*n*) Adams v. London and Blackwall Railway Co., 2 Mac. & G., 118; Lind v. Isle of Wight Ferry Co., 7 L. T. (N. S.), 416; 1 N. R., 13; cf. Leominster Canal Navigation Co. v. Shrewsbury and Hereford Railway Co., 3 K. & J., 654; and consider Baker v. Metropolitan Railway Co., 31 Beav., 504, 511.

(*o*) Marson v. London, Chatham and Dover Railway Co., L. R. 6 Eq., 101.

when the case came on for further consideration (*p*) the plaintiff's counsel admitted that there was no precedent pointing out what course was to be pursued; but they asked and obtained a direction that the defendant company should proceed under the lands clauses consolidation act to ascertain the amount payable for the value of the land, and directions for the payment of this amount and execution of the conveyance. The question of jurisdiction to make such a decree as was made does not seem to have been raised at the hearing.

§ **112**. After the ascertainment of the amount of purchase-money, the equitable jurisdiction of the court of chancery was clear. There then exists what has been called a parliamentary contract, and the performance of that so-called contract could not be enforced at common law, for the courts of common law having no machinery for investigating the title or settling the conveyance could not do complete justice between the parties; but a suit might have been maintained in equity by either party to carry into execution this quasi-contract.(*q*) For this purpose it seems to have been considered immaterial whether the compensation money had been ascertained in strict pursuance of the act or otherwise. In Mason v. Stokes Bay Pier and Railway Co.(*r*) and Harding v. The Metropolitan Railway Co.(*s*) the compensation money was ascertained by statutory arbitrations; in Nash v. The Worcester Improvement Commissioners (*t*) by the verdict of a jury, in Inge v. Birmingham, Wolverhampton and Stour Valley Railway Co.(*u*) the compensation was settled by correspondence, in The Regent's Canal Co. v. Ware (*v*) by arbitrators appointed under a written agreement, and in Watts v. Watts (*w*) by two surveyors named by parol; and in all these cases, as well where the act was as where it was not strictly pursued, the court of chancery entertained jurisdiction. In the latter class of cases the relation constituted approached to, if it did not assume, the character of true contract.

§ **113**. It is probably hardly needful to observe that, if,

(*p*) L. R. 7 Eq., 546.
(*q*) Regent's Canal Co. v. Ware, 23 Beav., 575; Mason v. Stokes Bay Pier and Railway Co., 32 L. J. Ch., 110; 11 W. R., 80; Harding v. Metropolitan Railway Co., L. R. 7 Ch., 154; Watts v. Watts, L. R. 17 Eq., 217.
(*r*) 11 W. R., 80; 32 L. J. Ch., 110.
(*s*) L. R. 7 Ch., 154.
(*t*) 1 Jur. (N. S.), 973.
(*u*) 1 Sm. & Giff., 347; S. C., 3 De G. M. & G., 658. See, too, Bee v. Stafford and Uttoxeter Railway Co., 23 W. R., 863.
(*v*) 23 Beav., 575.
(*w*) L. R. 17 Eq., 217.

after statutory notice, a contract should be entered into between the company and the landowner, such a contract may be the subject-matter of an action for specific performance, just in the same way as any other contract.(*x*) It is none the less a contract, because the relations between the parties began under the statutory powers of the company.[1]

(*x*) Per Kindersley, V. C., in Haynes v. Haynes, 1 Dr. & Sm., 457. See Wells v. Chelmsford Local Board of Health (15 Ch. D., 108), where the defendants ingeniously, but unsuccessfully, tried to give the go-by to the contract by proceedings under §§ 76, 77 of the lands clauses act.

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[1] *Not decreed when it would be inequitable so to do.*] Where the contract is for the sale of land, the court will not decree the specific performance of a contract to convey, where it would be unjust and inequitable so to do. Fitzpatrick v. Dorland, 27 Hun, 291.

Requisites.] Particularity, a consideration (which must be a valuable one), certainty, mutuality and a necessity for performance, are requisites upon which the equity of a case arises. Ashton v. Robinson, 49 Miss., 348; see, also, Willard v. Taylor, 8 Wall., 557.

Powers of United States courts.] The powers and rules of decision are the same in all the States; the equity jurisdiction is derived from the constitution and the laws of the United States. Noonan v. Lee, 2 Black., 499.

Specific performance as to contracts of insurance.] Where there is a contract to insure, and a loss has occurred, the court will not compel the plaintiff to have recourse to an action at law; it will decree specific performance of the contract and payment. Mead v. Davison, 3 Adol. & El., 303; Carpenter v. Mutual Safety Ins. Co., 4 Sandf. Ch., 408; Perkins v. Wash. Ins. Co., 4 Com. 645; S. C., 23 Wend., 18, 425; Taylor v. Merchants' Fire Ins. Co., 9 How. (N. S.), 405.

CHAPTER III.

OF CONTRACTS WITH A PENAL OR OTHER LIKE SUM.

§ **114**. From the principles stated in the last chapter, it appears that where a contract is substantially performed by the payment of a sum of money, the common law remedy being adequate, equity will not interfere. Hence, in cases where there is added to the contract a clause for the payment of a sum of money in the event of non-performance, the question arises whether the contract will be satisfied by its payment, or whether it will not. In the former case, equity will not interfere; in the latter it may.

§ **115**. The question always is, What is the contract? Is it that one certain act shall be done, with a sum annexed whether by way of penalty or damages to secure the performance of this very act? or is it that one of two things shall be done at the election of the party who has to perform the contract, namely, the performance of the act or the payment of the sum of money? If the former, the fact of the penal or other like sum being annexed will not prevent the court enforcing performance of the very act, and thus carrying into execution the intention of the parties; (*a*) if the latter, the contract is satisfied by the payment of a sum of money, and there is no ground for proceeding against the party having the election to compel the performance of the other alternative.[1]

§ **116**. From what has been said it will be gathered that

(*a*) Howard v. Hopkins, 2 Atk., 371; French v. Macale, 2 Dr. & War., 269; Roper v. Bartholomew, 12 Pri., 797.

[1] The test, in these cases, by which to determine whether relief will, or will not, be granted in equity, is to consider whether compensation can be made or not. If it can be made, then equity will interfere; if it cannot, equity will not interfere. Hackett v. Alcott, 1 Call., 533; Skinner v. Dayton, 2 John. Ch., 431. City Bank of Baltimore v. Smith, 3 Gill & John., 265. But the case must be such that the party can be fully and clearly indemnified, and placed in *statu quo*. Skinner v. Dayton, 2 John. Ch., 431; S. P., Skinner v. White, 17 id. 357.

contracts of the kind now under discussion are divisible into three classes:

(1) Where the sum mentioned is strictly a penalty—a sum named by way of securing the performance of the contract, as the penalty in a bond.

(2) Where the sum named is to be paid as liquidated damages for a breach of the contract.

(3) Where the sum named is an amount the payment of which may be substituted for the performance of the act at the election of the person by whom the money is to be paid or the act done.

Where the stipulated payment comes under either of the two first mentioned heads the court will enforce the contract, if in other respects it can and ought to be enforced, just in the same way as a contract not to do a particular act with a penalty added to secure its performance or a sum named as liquidated damages may be specifically enforced by means of an injunction against breaking it. On the other hand, where the contract comes under the third head, it is satisfied by the payment of the money, and there is no ground for the court to compel the specific performance of the other alternative of the contract.(*b*) It will be convenient to consider the three classes of cases separately.

§ **117**. (1) A penalty (strictly so called) attached to the breach of the contract will not prevent it from being specifically enforced.

"The general rule of equity," said Lord St. Leonards,(*c*) "is that if a thing be agreed upon to be done, though there is a penalty annexed to secure its performance yet the very thing itself must be done. If a man, for instance, agree to settle an estate and execute his bond for £600 as a security for the performance of his contract, he will not be allowed to pay the forfeit of his bond and avoid his agreement, but he will be compelled to settle the estate in specific performance of his agreement.(*d*) So, if a man covenant to abstain from doing a certain act and agree that if he do it he will

(*b*) "There are," said Bramwell, B., in Legh v. Lillie, 6 H. & N., 165, 171; 30 L. J. Ex. 25, 28, "three classes of covenants: first, covenants not to do particular acts, with a penalty for doing them, which are within the 8 and 9 Will. III, ch 11; secondly, covenants not to do an act, with liquidated damages to be paid if the act is done, which are not within the statute; and thirdly, covenants that acts shall not be done unless subject to a certain payment."

(*c*) In French v. Macale, 2 Dr. & War., 274-5.

(*d*) The case referred to seems to be Chilliner v. Chilliner, 2 Ves. Sen., 528.

pay a sum of money; it would seem that he will be compelled to abstain from doing that act, and, just as in the converse case, he cannot elect to break his engagement by paying for his violation of the contract."

§ **118**. Thus where two persons entered into articles for the sale of an estate, with a proviso that, if either side should break the contract, he should pay £100 to the other, and the defendant, by his answer, insisted that it was the intention of both parties that, upon either paying £100, the contract should be absolutely void, Lord Hardwicke nevertheless decreed specific performance of the contract to sell.(*e*) In another case, the condition recited a contract for a settlement comprising a sum of money and also real estate; the penalty was double this sum of money, but had no relation to the real estate; the court granted specific performance of the contract embodied in the condition.(*f*) And where a father, in consideration of his daughters giving up a part of their interest in the property, agreed to make up their incomes arising out of it to £200 a year, and entered into a bond for the payment of such sum as might be needful for that purpose, and the bond recited the contract, the court took this as evidence of the contract, and accordingly granted relief on the foot of it beyond the bond;(*g*) and in a case which went to the House of Lords, a contract (contained in the condition of a bond) to give certain property by will or otherwise, was held not to be satisfied by the penalty, but was specifically performed.(*h*)

§ **119**. So, again, a contract not to carry on a particular kind of business within certain limits expressed in the condition to a bond can be enforced by injunction.(*i*)

§ **120**. (2) The difference between penalty and liquidated damages is, as regards the common law remedy, most material. For according to common law, if the sum named is not a penalty, but the agreed amount of liquidated damages, the contract is satisfied either by its performance or the payment of the money.(*j*) But as regards the equitable

(*e*) Howard v. Hopkins, 2 Atk., 371.
(*f*) Prebble v. Boghurst, 1 Sw., 309.
(*g*) Jeudwine v. Agate, 3 Sim., 141.
(*h*) Logan v. Wienholt, 7 Bli. (N. S.), 1; 1 Cl. & Fin, 611. See, also, Butler v. Powis, 2 Coll, 156.
(*i*) Clarkson v. Edge, 33 Beav., 227; Gravely v. Barnard, L. R. 18 Eq, 518.
(*j*) Anon., Hard., 320; Lowe v. Peers, 4 Burr, 2225; Hurst v. Hurst, 4 Ex, 571; Legh v. Lillie, 6 H. & N, 165; Mercer v. Irving, El. B. & E., 563; Atkyns v. Kinnelr, 4 Ex., 776.

remedy the distinction is unimportant; for the fact that the sum named is the agreed amount to be paid as liquidated damages is, equally with a penalty strictly so called, ineffectual to prevent the court from enforcing the contract in specie.(*k*)[1]

§ **121**. The simplest illustration of this is the ordinary case of a stipulation on the sale of real estate that if the purchaser fail to comply with the condition he shall forfeit the deposit, and the vendor shall be at liberty to resell and recover as and for liquidated damages the deficiency on such resale and the expenses.(*l*) Such a condition has never been held to give the purchaser the option of refusing to perform his contract if he choose to pay the penalty, nor to stand in the way of specific performance of the contract.

§ **122**. In French v. Macale(*m*) Lord St. Leonards fully discussed the law as to compelling the performance of contracts of the kind under discussion. In that case there was a covenant in a farming lease "not to burn or bate the demised premises, or any part thereof, under the penalty of £10 per acre, to be recovered as the reserved yearly rent for every acre so burned." His lordship appears to have considered this increased rent as in the nature of liquidated damages and not a penalty; but, nevertheless, he granted an injunction against the burning, saying after a careful review of the authorities that in every case of this nature the question is one of construction, and that the court will always interfere unless there is evidence of an intention that the act is to be permitted to be done on payment of the increased rent.

§ **123**. In one case a deed was executed dissolving a partnership between H. and L., and containing a recital that it had been agreed that the deed should contain a covenant by L. not to carry on the trade within one mile from the old

(*k*) City of London v. Pugh, 4 Bro. P. C., 395; Webb v. Clark, 1 Fonbl. Eq., 154; French v. Macale, 2 Dr. & War., 296; Coles v. Sims, 5 De G. M. & G., 1; Carden v. Butler, Hayes & J., 112; Bird v. Lake, 1 H. & M., 111; cf. Bray v. Fogarty, I. R. 4 Eq., 544.

(*l*) "A purchaser," said Lord Eldon in Crutchley v. Jerningham (2 Mer., 506), "has no right to say that he will put an end to the agreement, forfeiting his deposit." Cf. Long v. Bowring, 33 Beav., 585.

(*m*) 2 Dr. & War., 269.

[1] *Liquidated damages.*] Where the contract stipulates for the payment of liquidated damages in case of failure of performance, the court may decree specific performance, unless the agreement itself gives an option of payment instead of performance. Hull v. Sturdivant, 46 Me., 44; Dooley v. Watson, 1 Gray, 414; Hooker v. Pynchon, 8 id., 550.

place of business "without paying to H., as or by way of stated or liquidated damages," a sum named. In a subsequent part of the deed there was an absolute covenant not to carry on the trade within that limit, followed by a proviso that if L. should act contrary to or in infringement of that agreement he would immediately thereupon pay to H. the sum of £1,500 by way of liquidated damages. Notwithstanding the recital and the form used, it was held that L. was not entitled to break the covenant on paying the £1,500, and an injunction was granted.(*n*)[1]

§ **124**. The same view was put forward, though perhaps in slightly different language, by the lords justices in Coles v. Sims.(*o*) That was a case in which there were mutual covenants between a vendor of part of his land and the purchaser of that part as to building on the sold and unsold parts, with a stipulation for payment of liquidated damages in case of breach of covenant. On an application for an interim injunction (which was granted), Knight Bruce, L. J., said:(*p*) "If I were now deciding the cause, I should probably come to the conclusion that in a case where a covenant is protected (if I may use the expression) by a provision for liquidated damages, it must be in the judicial discretion of the court, according to the contents of the whole instrument and the nature and circumstances of the particular instance, whether to hold itself bound or not bound upon the ground of it to refuse an injunction if otherwise proper to be granted; and that in the present case, the circumstances are such as to render it right for the court to grant an injunction." Turner, L. J., added: "The question in such cases, as I conceive, is whether the clause is inserted by way of penalty, or whether it amounts to a stipulation for liberty to do a certain act on payment of a certain sum."

§ **125**. Where the contract to do or not to do the act is

(*n*) Bird v. Lake, 1 H. & M., 111.
(*o*) 5 De G. M. & G., 1.
(*p*) 5 De G. M. & G., 9.

[1] *Injunction.*] A bond was given by a clerk to his employer, in the penalty of £1,000, stipulating that the obligor should not carry on the same business within a specified distance. Held, that the bond was not merely to secure the price of doing the business on the clerk's part, but to prevent him from doing it. An injunction was granted. Howard v. Woodward, 34 L. J. C., 47; Jones v. Heanens, L. R., 4 D. C., 636; see, however, Nobles v. Bates, 7 Cow., 307; Dakin v. Williams, 22 Wend., 201.

distinct from the obligation to pay a sum of money, it seems that either the contract or the obligation may be sued on.

"Where a person," said Lord Romilly, M. R., in Fox v. Scard,(*q*) "enters into an agreement not to do a particular act and gives his bond to another to secure it, the latter has a right at law and in equity, and can obtain relief in either, but not in both, courts."

§ **126**. It is clear that the fact that the contract may be comprised in a bond does not of itself import any election to pay the money and refuse to do the act.(*r*)

§ **127**. (3) In the third class of contracts, which may be distinguished as alternative contracts, the intention is that a thing shall be done or a sum of money paid at the election of the person bound to do or pay.

In these cases the contract is as fully performed by the payment of the money as by the doing of the act, and, therefore, where the money is paid or tendered there is no ground for interference by way of specific performance or injunction.

§ **128**. The question to which of the three foregoing classes of contracts any particular one belongs is, of course, a question of construction.[1] In considering it "the courts must, in all cases, look for their guide to the primary intention of the parties, as it may be gathered from the instrument upon the effect of which they are to decide, and for that purpose to ascertain the precise nature and object of the obligation."(*s*) Consequently each case depends on its own circumstances, but it may be noticed that "a court of equity is in general anxious to treat the penalty as being merely a mode of securing the due performance of the act contracted to be done, and not as a sum of money really intended to be paid;"(*t*) and that, "on the other hand, it is

(*q*) 33 Beav., 328.
(*r*) Hobson v. Trevor, 2 P. Wms., 191; Chilliner v. Chilliner, 2 Ves. Sen., 528; Clarkson v. Edge, 33 Beav., 227. "The form of marriage articles by bond does not import election." Roper v. Bartholomew, 12 Pri., 797.
(*s*) Roper v. Bartholomew, 12 Pri., 821.
(*t*) Per Lord Cranworth in Ranger v. Great Western Railway Co., 5 H. L. C., 94; Astley v. Weldon, 2 Bos. & P., 346.

[1] Hacklett v. Alcott, 1 Call., 533; City Bank of Baltimore v. Smith, 3 Gill & John., 265; Moore v. Platt Co., 8 Mo., 467. The intention of the parties, if it can be ascertained, must govern as to whether the sum specified is to be regarded as a penalty, or as liquidated damages. The case, however, must be free from fraud. Durst v Swift, 11 Lexax, 273; Cothreal v. Talmadge, 9 N. Y., 557; Bagley v. Peddie, 16 id., 469. A different rule is held in Michigan. See Jaquith v. Hudson, 5 Mich., 123. In Iowa, the inclination of the court is to regard the amount named as a penalty, where it is doubtful what the parties really intended. Foley v. Keegan, 4 Iowa, 1.

certainly open to parties who are entering into contracts to stipulate that on failure to perform what has been agreed to be done, a fixed sum shall be paid by way of compensation."(*u*)[1]

§ **129**. On this question it is by no means conclusive that the contract may be alternative in its form, for, nevertheless, the court may clearly see that it is essentially a contract to do one of the alternatives; so that where there was a contract to renew a certain lease, with an addition of three years to the original term, or to answer the want thereof in damages, the court decreed specific performance of the lease,

(*u*) Ranger v. Great Western Railway Co., 5 H. L. C., 94.

[1] The legal operation of a penalty, properly so called, is not to create a forfeiture of the entire sum named, but only to cover the actual damages occasioned by the breach of contract; and, therefore, on payment of such damages, or in the case of a bond, of the principal and interest actually due, the party who has incurred the penalty will be relieved or discharged from it. But in the case of what is termed *liquidated damages*, the whole of the precise sum named may be exacted of the party who is in default, and the court will not interfere to relieve him Burr. Law Dict. The theory in courts of equity, in granting relief in cases of penalties, treats them as securities for the conditions of the contract—as a means of securing payment—and it is only on this ground that relief is granted. 1 Fonbl. Eq. B. 1, ch. 6, § 4, note (*h*). Peachy v. Duke of Somerset, Pre. Ch. 568; Skinner v. Dayton, 2 John. Ch., 535. It is in cases of this kind only—that is, in the nature of a security—that a court of equity will ever enforce a *forfeiture*. "It is admitted, indeed," says Mr. Justice Story, "that where the condition or forfeiture is merely a security for the non-payment of money (such as the right of re-entry upon non-payment of rent), there it is to be treated as a mere security, and in the nature of a penalty, and is accordingly relievable." Hill v. Barclay, 18 Ves, 58; Wadham v. Calcraft, 10 id., 68; Reynolds v. Smith, 19 id., 140. But if the forfeiture arises from the breach of any other covenant of a collateral nature, as, for example, of a covenant to repair, there, although compensation might be ascertained, and made upon an issue *quantum damnificatus*, yet it has been held that courts of equity ought not to relieve, but should leave the parties to their remedy at law. Wadham v. Calcraft, 10 Ves., 68; Hill v. Barclay, 16 id., 403; S. C., 18 id., 59; Reynolds v. Pitt, 19 id., 140; Bracebridge v. Buckley, 2 Price's R., 200. In England it is held, that in all cases of forfeiture for the breach of any covenant, other than a covenant to pay rent, no relief ought to be granted, in equity, unless upon the ground of accident, mistake, fraud or surprise, although the breach is capable of a just compensation. Eaton v. Lyon, 3 Ves., 692; Bracebridge v. Buckley, 2 Price's R., 200; Hill v. Barclay, 16 Ves., 403; Rolf v. Harris, 2 Price's R., 206; White v. Warner, 2 Meriv., 459; Eden, Injunc., ch. 2, p. 22. In New York it has been held that relief will not be granted for a breach of a condition contained in a lease, unless the forfeiture was incurred through accident or mistake, for which compensation can be made to the other party; or where the forfeiture is in the nature of a mere security for the payment of money. Baxter v. Lansing, 7 Paige, 350. The rule, however, was formerly different. Popham v. Bampfield, 1 Vern., 33; Haywards v. Angell, 1 id., 222; Northcote v. Dake, Ambler's R., 513; Sanders v. Pope, 12 Ves., 289. Though the distinction is, of itself, no ground to support a bill in chancery, yet equity will not refuse to compel performance of a contract in the form of a penal bond, on the ground that the remedy is at law. Telfair v. Telfair, 2 Dessau, 271.

the second alternative only expressing what the law would imply.(*v*)[1]

§ **130**. The largeness or smallness of the sum named is no reason for considering it a mere penalty, unless that be the

(*v*) Finch v. Earl of Salisbury, Finch, 212.

[1] Neither will courts of equity suffer "their jurisdiction to be evaded, merely by the fact that the parties have called a sum damages, which is, in fact and in intent, a penalty; or because they have designedly used language and inserted provisions which are in their nature penal, and yet have endeavored to cover up their objects under other disguises The principal difficulty in cases of this sort, is to ascertain when the sum stated is, in fact, designed to be in *nomine pœnæ*, and when it is properly designed as liquidated damages." Story's Eq. Jur., 1318. See Watts v. Shepherd, 2 Ala., 425. It is said in Owens v. Hodges, 1 McMullan, 106, that where a party to a contract stipulates to perform one or more things, and, in the event of the non-performance of any or all of them, agrees to pay a certain sum, the sum agreed to be paid will be regarded as a penalty, and not as liquidated damages. Where a large sum is agreed to be paid upon the non-payment of a smaller, or the non-performance of a duty, the damages resulting from which may be ascertained with reasonable certainty, and which is much less than the sum expressed, that sum will be a penalty. Watts v Shepherd, 2 Ala., 425. A. engaged by bond "in the full and just sum of $500, liquidated damages," to convey to B. 3,000 feet of land, and afterwards, on B's demand, executed a deed to him, conveying a lot of land described by metes and bounds. B. accepted the deed, and he and A. agreed that, if it was not right, it should be made right. It was afterwards found, upon a survey of the land conveyed, that it contained only 2513 feet. Held, in a suit by B. on the bond, that as he had accepted said deed in part performance of the bond, the sum of $500, was not to be regarded as liquidated damages, but that he was entitled to recover only the actual damages which he had sustained. Shute v. Taylor, 5 Metc., 61. A. agreed to do a piece of work for $758, and gave his bond with sureties, to secure the performance of the work, in the sum of $1,570, "not as a penalty but as liquidated damages." Held, that such sum was to be considered as a penalty, and not as liquidated damages. Moore v. Platte County, 8 Mis., 467. Where it was agreed, by the terms of the contract, among other things, that one party should give to the other, on a specified day, a promissory note for $200, and, on a subsequent day, his bond and mortgage for $2,100, and that if either party should fail to perform the contract according to the instrument, he should pay to the other $500 as liquidated damages, it was held that the parties gave the wrong name to this sum, and that it must be regarded as a penalty and not as liquidated damages. Lampman v. Cochran, 16 N. Y. (2 Smith), 275; see Foley v McKeegan, 4 Iowa, 1. If, by the agreement, it is doubtful whether the parties intended that the sum specified should be a penalty or liquidated damages, courts incline to treat the contract as creating a penalty to cover the damages actually sustained by one breach, and not as liquidated damages. Foley v. McKeegan, 4 Iowa, 1. In Cowan v. Gerrish, 3 Shep , 273, and in Durst v. Swift, 11 Texas, 273, it is said that the lawful intention of the parties, in a case free from fraud, where it can be ascertained, must have a decisive influence in determining whether the sum stated in the instrument is to be regarded as a penalty But, on the other hand, it is held, in Jaquith v. Hudson, 5 Mich., 123, that the real question, in this class of cases, is not what the parties intended, but whether the sum is in the nature of a penalty or of liquidated damages—that this is to be determined by the magnitude of the sum in connection with the subject-matter. But that where, from the nature of the contract, the subject-matter, etc., the actual damages from a breach are uncertain or difficult to ascertain, under these circumstances, the parties are permitted to estimate for themselves, and provide in their contract for the amount to be paid on a breach. [Per Christiancy, J.] Perhaps, however, the true doctrine was laid down in Cotheal v. Talmadge, 5 Seld. (N. Y.), 557. Here it was said that where the damages resulting from the breach of an agreement would be very uncertain, and evidence of their amount very diffi-

apparent intention;(*w*) but where the amount of the penalty is small, as compared with the value of the subject of the contract, it has been considered a reason for treating the sum reserved as a mere penalty, and not in the nature of an alternative contract.(*x*)

§ **131**. In a case where a man, being very uncertain what estate he should derive from his father, entered into a bond

(*w*) Roy v. Duke of Beaufort, 2 Atk., 190; Astley v. Weldon, 2 Bos. & P., 346; French v. Macale, 2 Dr. & War., 269. But see Burne v. Madden, Ll. & G., t. Plunk., 493.

(*x*) Chilliner v. Chilliner, 2 Ves. Sen., 528.

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cult to obtain, and the fair import of the agreement is that the amount named in it is specified and agreed on to save expense, and avoid the difficulty of proving the actual damage, and is not out of proportion to the probable actual damage, it will be regarded as liquidated damages. Thus, in Nobles v. Bates, 7 Cow., 307, a decision in accordance with the English case of Sainter v. Ferguson, 7 C. B., 715, where N. & B. dissolved their partnership in business, and their articles of dissolution declared one object of the dissolution to be, that N. should relinquish the trade—that B. should pay him $3,000, in various installments, the last being $750—and that if N. should set up the business within twenty miles of their former place of business, he should forfeit that installment; held, that the installment of $750 must be considered as liquidated damages; and, as such, to be forfeited by a breach of the condition of N. Sutherland, J., in delivering the opinion of the court, said: "The parties have fixed the value of that item in the consideration at $750. In the nature of the case, the precise injury which the defendant would sustain from the establishment or continuance of the same kind of business could not be accurately ascertained. It must depend upon a variety of circumstances; upon the capital which the party might invest; the industry which he might exert; and the patronage from these, and other causes, he might be able to attract." In Bagley v. Peddie, 16 N. Y. [2 Smith], 469, a bond declared the obligors to be bound in the sum of $3,000 as liquidated damages, and not by way of penalty, for the performance of the covenants of a written agreement. One of the covenants was, not to reveal the secrets of a trade in which the principal obligor was to be employed. It was held, that the amount of damages to result from a breach of this stipulation of the agreement was so uncertain and conjectural, that the sum named in the bond should be considered as liquidated damages, and not a penalty, although the damages of the actual breach were certain. The following cases were also held to be those of liquidated damages: A party agreed to convey a tract of land for $1,200, a part of which was to be paid down, and was to be received as part of the consideration money, if the purchase were completed, or of the damage, if the contract were not performed; and he also covenanted, if he did not conform to his agreement, to pay $500 as forfeiture. Chamberlain v. Bagley, 11 N. H., 234. A. covenanted with B. to procure and deliver to him, within a limited time, the certificate of third persons to a certain effect, and stipulated that if he failed to do so, he would pay him $500 liquidated damages. Hamilton v. Overton, 6 Blackf., 206. Where a party, in consideration of having conveyed to him fourteen city lots for only $21,000, covenanted that he would, by a certain day, erect two brick houses, or in default thereof pay to the grantor, on demand, the sum of $4,000. Where the plaintiffs gave $3,000 for the patronage and good will of a newspaper, and $500 for the type, etc., and the vendors covenanted that they would not publish a rival paper, etc., and the measure of damages was fixed at $3,000. Dakin v. Williams, 22 Wend., 201. Where the parties contract mutually to do certain acts at a fixed time, and "respectively bind themselves each to the other in the sum of $500, for the faithful performance of the several agreements herein entered into," the sum is not to be considered as a penalty. Gammon v. Howe, 2 Shep., 250. Where publishers agree to sell law reports to all applying or pay $100 for each refusal. Little v. Banks, 85 N. Y., 258.

in £5,000, on the marriage of his daughter, to settle one-third of such property, and the contract so to settle was recited in the condition of the bond, it was specifically performed in full, and not up to £5,000 only.(*y*) "Such agreement," said Lord Macclesfield,(*z*) "was not to be the weaker but the stronger for the penalty."

§ **132**. The fact that the benefit of the contract would result to one person, or flow in one channel, and the benefit of the sum, if paid, in another, is a strong circumstance against considering the contract alternative in its nature; thus where, on a marriage, the husband's father gave a bond for the payment of £600 to the wife's father, his executors or administrators, in the penalty of £1,200 if he did not convey certain lands for the benefit of the husband and wife and their issue, Lord Hardwicke held that the obligor was not at liberty to pay the £600, or settle the lands, at his election, but compelled the specific performance of the contract to settle—partly on the ground that the £600 would not have gone to the benefit of the husband and wife and their issue, but of the wife's father and his representatives, and partly that the lands to be settled were worth much more than £600.(*a*)

§ **133**. Where the sum reserved is single, and the act stipulated for or against is in its nature continuing or recurring, as, for instance, particular modes of cultivating a farm, the sum will be considered as a security and not an alternative.(*b*)

§ **134**. On the other hand where the sum or sums made payable vary in frequency of payment or amount according to the thing to be done or abstained from, the courts have, in many cases, found that the payment is an alternative.

§ **135**. In Woodward v. Gyles(*c*) a covenant by the defendant not to plough meadow land, and if he did, to pay so much an acre, was held not to be a fit case for an injunction restraining the ploughing; but the exact form of the covenant does not appear. "If," said Lord St. Leonards,(*d*) "as in Woodward v. Gyles,(*e*) and Rolfe v. Peterson,(*f*)

(*y*) Hobson v. Trevor, 2 P. Wms., 191.
(*z*) 2 P. Wms., 192 (6th ed.).
(*a*) Chilliner v. Chilliner, 2 Ves. Sen., 528; Roper v. Bartholomew, 12 Pri., 797.
(*b*) French v. Macale, 2 Dr. & War., 269. And see Roper v. Bartholomew, 12 Pri., 797.
(*c*) 2 Vern., 119.
(*d*) 2 Dr. & War., 284.
(*e*) 2 Vern., 119.
(*f*) 2 Bro. P. C., 436.

there is evidence of intention that the party is to be at liberty to do the act if he choose to pay the increased rent, of course the court cannot interfere, because this court never interferes against the express contract of the parties."

§ **136**. In Rolfe v. Peterson (*g*) the question was whether the payment was a penalty and so came within the doctrine of equitable relief against penalties; but of it Lord Loughborough said, in Hardy v. Martin (*h*): "That was a case of demise of land to a lessee to do with the land *as he thought proper;* but if he used it one way he was to pay one rent and if another way another rent." Similarly, a covenant in a farm lease not to do certain things "under an increased rent of," etc., was held to give the tenant the right to do the act on paying the increased rent, (*i*) and a contract to renew perpetually "under a penalty of £70," was held alternative. (*j*)

§ **137**. But where, in addition to the increased rent, there is a stipulation that the act provided against shall be a forfeiture of the covenantor's interest, the sum is held to be a security only and not an alternative; and consequently the court would restrain the doing of the act; (*k*) and, of course, the usual form of lease giving the lessor the right to re-enter and avoid the lease on breach of covenant offers no impediment to the enforcement of the covenants specifically. (*l*)

§ **138**. Where the contract would be unreasonable unless it gives an option to the person stipulating to pay the sum, this will be a strong circumstance for treating the contract as alternative. So where a lady, administratrix of her husband, covenanted, under a penalty of £70, to renew a sublease as often as she obtained a renewal of the head-lease, and it appeared that the fines on the head-lease were raised on renewal, according to the then value of the property, so as to render her covenant unreasonable except upon the construction of its giving her an option, the House of Lords treated the contract as alternative. (*m*)

(*g*) 2 Bro. P. C., 436.
(*h*) 1 Cox, 26.
(*i*) 2 Legh v. Lillie, 6 H. & N., 165; 9 W. R., 55; 30 L. J. Ex., 25. And see Hurst v. Hurst, 4 Ex., 571; Gerrard v. O'Reilly, 3 Dr. & War., 414.
(*j*) Magrane v. Archbold, 1 Dow, 107.
(*k*) Barret v. Blagrave, 5 Ves., 555, as explained by Lord St. Leonards in French v. Macale, 2 Dr. & War., 278–9.
(*l*) Dyke v. Taylor, 3 De G. F. & J., 467.
(*m*) Magrane v. Archbold, 1 Dow, 107.

PART II.

PARTIES TO THE ACTION.

CHAPTER I.

OF THE GENERAL RULE.

§ **139**. In considering the subject of this chapter it will be convenient to treat separately (1) of the rules formerly applicable to suits for specific performance in the court of chancery, and (2) of the rules now applicable to like actions in the high court constituted by the judicature act, 1873. It is not yet possible to neglect the old practice, as it will no doubt be appealed to, from time to time, as assisting to guide the court under the new practice.

1. *As to the former practice of the court of chancery.*

§ **140**. The general rule with regard to suits to enforce contracts was that the parties to the contract, or their representatives, were the necessary and sufficient parties to the suit—that all the parties to the contract should be parties to the suit and no one else.(*a*)[1] The contract is what constitutes the rights and regulates the liabilities of the parties; in a stranger there is no liability; and against him, therefore, there was no more right to enforce specific performance in equity than to recover damages at law.(*b*)

(*a*) Mole v. Smith, Jac., 490; Tasker v. Small, 3 My. & Cr., 63, 69; Wood v. White, 4 id., 460, 483; Humphreys v. Hollis, Jac., 73; Patterson v. Long, 5 Beav., 186; Peacock v. Penson, 11 id., 355; Bishop of Winchester v. Mid-Hants Railway Co., L. R. 5 Eq., 17, 21; Lumley v. Timms, 21 W. R., 319; S. C., id., 494; Halifax Joint Stock Banking Co. v. Sowerby Bridge Town Hall Co., 25 Sol. Jo., 450; W. N., 1881, 65.

(*b*) Hare v. London and North Western Railway, 1 J. & H., 252.

[1] McKee v. Beal, 3 Litt. (Ky.), 190; McWherter v. McMahon, 1 Clark (N. Y.), 400. A party sold land which had been decreed to him. Held, that the purchaser might compel a conveyance to himself by an original bill. Respass v. McClanahan, 2 A. K. Marsh, 577.

§ **141**. It made no difference, that the stranger to the contract might be a necessary party to the conveyance, as a judgment creditor, or a legal or equitable mortgagee, or a person interested in the equity of redemption.(*c*) In Tasker v. Small (*d*)[1] the bill was filed by the purchaser of an equity of redemption against the vendors, and Phillips, the first mortgagee, was made a defendant on the ground that the legal estate being vested in him he refused to convey without having competent authority for so doing. Lord Cottenham, however, said,(*e*) "Phillips is merely a mortgagee against whom no bill can properly be filed except for the purpose of redeeming his mortgage, and that by a party entitled to redeem. This bill does not pray any redemption of Phillips' mortgage, and if it had, the plaintiff would not be entitled to file such a bill. He is only connected with the property by having contracted to purchase the equity of redemption, and until that purchase is completed, he cannot redeem the mortgage. Phillips has no interest in the specific performance of the contract; he is no party to it, and the performance of it cannot affect his security or interfere with his remedies." [2]

§ **142**. Where the owner of land contracted to grant a lease to A. and then mortgaged the land to B. with notice of the contract, and B. did not dispute A.'s right to the

(*c*) Tasker v. Small, *ubi sup.*, overruling S. C., 6 Sim., 625, 636; cf. Sober v. Kemp, 6 Ha., 155 (a mixed case of specific performance and foreclosure). See, also, Petre v. Duncombe, 7 Ha., 24 (a purchaser's bill), and Lord Leigh v. Lord Ashburton, 11 Beav., 470 (a vendor's bill), from which it appears that judgment creditors, though not necessary, might be proper parties. See, also, Greycoat Hosp. v. Westminster Imp. Comms., 1 De G. & J., 531; Hall v. Laver, 3 Y. & C. Ex., 191. As to whether there was any difference in that respect between suits to rescind and suits to enforce contracts, see Aberaman Ironworks v Wickens, L. R. 4 Ch., 101, 111, and Fenwick v. Bulman, L. R. 9 Eq., 165.

(*d*) 6 Sim, 625; 3 My. & Cr., 63.

(*e*) 3 My. & Cr., 69.

[1] The rule as laid down in Tasker v. Small, 3 My. & Cr., appears to be, that parties for whose benefit a contract was not made, and who were not parties or privies to it, could not ask for a specific performance of the same. This was held in Beardsley Scythe Co. v. Foster, 36 N. Y., 561; and Bagott v. Wetmore, 17 N. J. Eq., 250. Where a general creditor has not obtained judgment, and one who has no special claim upon the property of his debtor—Held, that he had no right to call for the specific execution or rescission of the debtor's contracts for his own benefit. Griffith v. Frederick Co. Bank, 6 Gill & John., 424.

[2] *Rule as to parties.*] The rule appears to be that the remedy in equity shall either be between the parties who stipulated what should be done, or those standing in their place. Burgess v. Wheate, 1 W. Bl., 129. Where, before the commencement of the action, a partial assignment of the complainant's interest to a person who did not join in the bill—Held, no defense. Willard v. Taylor, 8 Wall., 557; Levy v. Brush, 8 Abb. Pr. (N. S.), 418.

lease, it was held that B. was not a proper party to a suit by A. for specific performance.(*f*)

§ **143**. And so where a steward was made a party as being receiver of the rents, and having the title-deeds in his possession, the bill was dismissed as against him.(*g*) And in a suit to enforce a contract made by a mortgagee under a power of sale, the mortgagor was not a necessary party;(*h*)[1]

(*f*) Long v. Bowring, 33 Beav., 585, 589.
(*g*) Macnamara v. Williams, 6 Ves., 143. And see Muston v. Bradshaw, 15 Sim., 192; 10 Jur., 402.
(*h*) Corder v. Morgan, 18 Ves., 344; Ford v. Heely (Stuart, V. C.), 3 Jur. (N. S.), 1116; Clay v. Sharpe, 18 Ves., 346, n.

[1] All persons materially interested in the subject of the suit, ought to be made parties either as plaintiff or defendant, in order to prevent a multiplicity of suits, and that there may be a complete and final decree between the parties interested. And this rule is restricted to parties whose interests are involved in the issue, and to be affected by the decree. And the relief granted will always be so modified as not to affect the interests of others. Mechanics' B'k v. Seyton, 1 Pet., 299; Hussey v. Dole, 24 Me., 20; McConnell v. McConnell, 11 Verm., 290; Noyes v. Sawyer, 3 id., 160; Crocker v. Higgins, 7 Conn., 342; New London B'k v. Lee, 11 id., 112; Hawley v. Cramer, 4 Cow., 717; Oliver v. Palmer, 11 Gill. & John., 476; Clark v. Long, 4 Rand., 451; Vaum v. Haggett, 3 Dev. & Bat. 31; Frazer v. Legare, 1 Bailey's Ch., 389; Lucas v. B'k of Darien, 2 Stew., 280; Park v. Balentine, 6 Blackf., 223; Caldwell v. Taggart, 4 Pet., 190. A person for whose benefit an agreement is made, though not a party to such agreement, may maintain a suit in chancery for a specific performance. In a suit to set aside a judgment in the name of a sheriff upon a replevin bond, the sheriff should be made a party, though he has no personal interest in the suit. Campbell v. Weston, 3 Paige, 124. In Michigan, where an officer has an execution in his hands, still in force, he is a necessary party to a bill which seeks to restrain proceedings on it. Bumpee v. Smith, Walk. Ch., 327. In Alabama and Illinois, the rule is the reverse. Shrader v. Walker, 8 Ala., 244. Lackay v. Curtis, 6 Ired. Ch., 199. Where a person is interested in the matter of a bill as executor, and also as devisee, he should be made a party in both capacities; and it is not sufficient to make him a party as executor, and to call upon him to answer as such. Mayo v. Tompkins, 6 Mumf., 520. A partner of a complainant and joint obligor on notes given in the course of various mercantile transactions, which the bill is brought to settle, must be made a party to the bill. Dozier v. Edwards, 3 Litt., 67. Where it appeared from the bill that a party defendant had had an interest in the subject-matter, and it did not appear clearly that he had parted with all that interest, an exception to his being made a party taken under a general demurrer to the bill, was held not to be sustainable. Craire v. Deming, 7 Conn., 387. And where, in the progress of a suit, a third party is found to be interested, he should be made a party. Carman v. Watson, 1 How. (Miss.), 334. Where to grant the prayer of a bill in equity will affect the duties of receivers of a corporation, they should be made parties. Smith v. Trenton and Delaware Falls Co., Greens's Ch., 505. And in a suit against the trustees of an incorporated religious society, to prevent them from ejecting the clergyman from the temporalities and from the pulpit, it seems the church corporation should be made a party. Lawyer v. Cipperly, 7 Paige, 281. As to who must not be made parties, it may be said, that a person with no interest in the cause, who might be examined as a witness, cannot be made a party. Reeves v. Adams, 2 Dev. Ch., 192. And a person having merely a contingent interest in the suit, cannot be made a party litigant. Reed v. Vanderheyden, 5 Cow., 719; Baker v. Rowan, 2 Stew. & Port., 317; Barbour v. Whitlock, 4 Monr., 180. And where a party commenced a suit as one of the next of kin of a decedent, and afterwards became disinterested in consequence of the birth of a posthumous child, it was held that he could not appeal from the decree in the cause. Id. As to

unless the purchaser had notice that the mortgagor disputed the validity of the sale.(*i*)

§ **144**. In a case before Shadwell, V. C., where the vendor sold the same property twice over and the bill was brought by the first purchaser against the vendor and the second purchaser, it was dismissed (without costs) as against the latter, though specific performance was decreed as against the original contractor; (*j*) this was affirmed by Lord Lyndhurst after two arguments; and Turner, L. J., laid down the same doctrine.(*k*)

§ **145**. Again, where two houses held under one lease were sold in separate lots at the same auction, and it was stipulated that each purchaser should be a party to the other's assignment, it was held that the purchaser of lot two was not a necessary party to a suit to enforce the contract with the purchaser of lot one.(*l*) And a bill by a purchaser for specific performance could not be sustained against parties to a previous contract to sell the same land which the bill impeached.(*m*)

(*i*) Anon., 6 Mad. 902. But see Clay v. Sharpe, 18 Ves., 346, n. See too Anon v. Walford, 4 Russ., 372.

(*j*) Cutts v. Thodey, 1 Coll., 212, 223. See Giff., 99; Dance v. Goldingham, L. R. 8 Ch.,

(*k*) Chadwick v. Maden, 9 Ha., 188.

(*l*) Paterson v. Long, 5 Beav., 186.

(*m*) De Hoghton v. Money, L. R. 1 Eq., 154; affirmed, Id., 2 Ch., 164.

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who need not be made parties. it has been held that where a bill contains an allegation that a person is out of the State, such absent person need not be made a party. Spivey v. Jenkins, 1 Ired. Ch., 126. But see Russell v. Clark, 7 Cranch, 69. On account of the limited and peculiar jurisdiction of the United States courts, if an equity cause may be proceeded in to a final decree between the parties to it, without making others parties, who would generally be considered necessary parties, they need not be made parties where the process of the court cannot reach them, or where they are citizens of another State. Mallow v. Hinde, 12 Wheat., 193. Although if a final decree between the litigating parties, will necessarily affect the right of those who are absent, the peculiarity of the jurisdiction of the court will not authorize the dispensing with them. Id. But it seems that the court might, in the case of an injunction bill, retain jurisdiction of the parties regularly before it, until the plaintiffs could have an opportunity to contest the claims of the other parties, in a competent tribunal; and if it is there made to appear by the judgment of such tribunal that the complainants are entitled to the interest claimed by such other parties, the court may proceed to a final decree. Id Where a person cannot, by the laws of the United States, be made a party to a bill, on account of his residence in another State, he need not be made a party to such bill, though, if within the jurisdiction of the court, he would be a necessary party. Joy v. Wirtz, 1 W. C. R., 517. Where a decree, in relation to the subject-matter of litigation, can be made without a person having his interest in any way concluded by the decree, he is not an essential party. Among this class of cases, are suits brought by part of a privateer's crew for prize money; suits by creditors seeking an account of their deceased debtor's estate; legatees' suits against executors; and actions brought by a few members of a society for the benefit of all. Story v. Livingston, 13 Pet., 359.

§ **146**. In connection with the question under consideration it may be noticed that a direction in an order that A. should convey included in effect mortgagees and all other necessary conveying parties, and the omission of the words commonly inserted that A. "and all other necessary parties if any" should convey was immaterial.(*n*)

§ **147**. Where the suit sought other relief than that in specific performance, though all arising from a contract, the court might require the presence of other parties. To this proposition the following case may be referred. A railway company had been let into possession of some land agreed to be purchased, and had agreed to demise the railway to another company, and had let such other company into possession, but had not paid the purchase-money of the land; the vendors of the land filed a bill for specific performance of the contract, payment of the purchase-money, and an injunction to restrain the companies from continuing in possession of the land, for enforcing the vendors' lien for unpaid purchase money, for a receiver, and damages. The lessees, whose possession the plaintiff sought to disturb, were held proper parties.(*o*)

§ **148**. On the other hand, the general principle under discussion was strongly illustrated by the case of Robertson v. The Great Western Railway Company.(*p*) The plaintiff had agreed to sell to the defendants a piece of land, and to buy up the right then vested in his tenant; the defendants having entered before payment of the purchase-money, they were served with notices not to trespass on the land both by the plaintiff and his tenant. The plaintiff then brought his bill for a specific performance and to restrain the trespass, to which the defendants demurred, on the ground that the tenant was not a party. Shadwell, V. C., allowed the demurrer, considering that two persons being affected by the injury the court must have them both before it; but the demurrer was overruled by Lord Cottenham on the grounds that the object of the suit was a specific performance, and that the company might be restrained from entering without payment of the purchase-money, whether that entry did or did

(*n*) Minton v. Kirwood, L. R. 3 Ch., 614.
(*o*) Bishop of Winchester v. Mid-Hants Railway Co., L. R. 5 Eq., 17. See Sedgwick v. Watford, etc., Railway Co., 36 Id., Ch., 379; Cosens v. Bognor Railway Co., Id., 1 Ch., 594.
(*p*) 1 Rail. C., 459; S. C., 10 Sim., 314.

not affect the tenant; and that to say that the plaintiff could not so restrain the company without bringing the tenant before the court would be to exclude the jurisdiction of the court.

§ **149**. In the court of chancery persons having adverse or inconsistent rights in the subject-matter of the suit could not be joined as plaintiffs;(*q*) nor could a person who had no interest be joined as plaintiff with one who had.(*r*)[1] The

(*q*) Fulham v. M'Carthy, 1 H. L. C., 703; Padwick v. Platt, 11 Beav., 503.

(*r*) S. C. and per Lord Lyndhurst in King of Spain v. Machado, 4 Russ., 240. See, also, Pearce v. Watkins, 16 Jur., 832.

[1] Parties having conflicting interests in the subject of litigation should not be joined as plaintiffs in the suit; and in a suit by the husband to set aside a conveyance in trust, for the use of his wife and her children, the wife should be made defendant. Grant v. Schoonhoven, 9 Paige, 225. But where all persons have the same interest, they should be placed on the same side of the suit. If any refuse to appear as plaintiffs, they may be made defendants, their refusal being stated in the bill. Contee v. Dawson, 2 Bland, 264; Payson v. Owen, 3 Des., 31; Cook v. Hadley, Cooke, 465; Morse v. Hovey, 9 Paige, 197. A refusal to be joined as co-complainants was inferred, where the assignees of a party who had become insolvent, were made defendants in a bill of revivor, putting in their answer as such and making no objections to that character. Osgood v. Franklin, 2 John. Ch., 1. A mis-joinder of complaints seems to be an error fatal to the validity of a bill. "It is well settled," says Vice Chancellor McCoun, in Clayson v. Lawrence, 3 Edw. Ch., 53, "to be a sufficient ground for dismissing a bill, that a person is joined as co-complainant, who has no interest in the matters of the suit, and no right to sue; and the objection may be taken by demurrer or raised by plea, as the case may be." Clarkson v. De Peyster, 3 Paige, 337; Bowie v. Minter, 2 Ala., 406. But it is held, in Bugbee v. Sargent, 23 Me., 269, that the mis-joinder of parties defendant is not a sufficient cause for the dismissal of a bill, as it respects other parties than those improperly joined. But a non-joinder of proper parties will not oust the court of its jurisdiction. Wormley v. Wormley, 8 Wheat., 421; Milligan v. Milledge, 3 Cranch, 220; Nash v. Smith, 6 Conn., 421; Singleton v. Gayle, 8 Porter, 270. Although, in some cases, a bill may be dismissed without prejudice, and without precluding the right of the complainants to bring a new bill in amended form. Mims v. Mims, 3 J. J. Marsh., 103; Rowland v. Garman, 1 id., 76; Marry v. Rogers, 2 Bibb., 314. The proper course, where there is a want of parties, is to order the case to stand over, to enable the plaintiff to join the proper parties. But, though the want of necessary parties to a bill is not ground for dismissal in the first instance, yet, if the complainant neglects or refuses to make the necessary parties, after objection made, the bill will be dismissed. Singleton v. Gale, 8 Porter, 270; Greenleaf v. Green, 1 Pet., 138. Thus, in Thompson v Clay, 1 J. J. Marsh, 413, where the circuit court dismissed a bill absolutely, where some of the necessary parties were not before the court: on error to the Court of Appeals, it was held, that the cause should be remanded, the complainant to have leave to bring in the proper parties, and then, that such a decree as might be just be rendered; but if the complainant failed to make the necessary parties, that the bill should be dismissed without prejudice. Where a defendant, who is a necessary party to a bill, refuses to appear, and the court has no power to compel him to appear, the bill will be dismissed on motion of the co-defendants. Picynet v. Swan, 5 Mason, 561. Where the parties in interest are so numerous as to render it inconvenient, if not impracticable, to make them all defendants, without great delay and expense, and justice can be done between the parties before the court without affecting the interests of the others, the court will proceed to decree, notwithstanding the want of parties. Boisgerard v. Wall, 1 S. & M. Ch., 404. And

importance of the doctrine of misjoinder was, however, diminished by the forty-ninth section of the chancery procedure act, 1852.(*s*) In some cases, persons claiming adversely might be made defendants.(*t*)

§ **150**. To the general rule above stated(*u*) it will be found that many exceptions arose; some of these will be noticed in the subsequent chapters in this part. But there are other exceptions, or apparent exceptions, to the strict rule, which may well be stated here.

§ **151**. One case where the parties to the original contract were not those to the suit was, where there had been a novation or new contract substituted for the original one by the intervention of a new person; in which case the party in whose place the new person was introduced, being no longer a party to the contract, ceased to be a proper party to the suit, and it had to be carried on between the parties to the new contract. Thus, where A. agrees to sell to B., and, before completion, B. contracts to sell to C., and A. accepts C. as the purchaser, this may amount to a new contract; and even where it did not strictly do so, B. might be an unnecessary party to the suit.(*v*)

§ **152**. One of the most remarkable instances of novation occurs in sales on and is the result of the custom of the stock exchange. The vendor's broker sells shares to a jobber, the jobber sells to another broker, or to several brokers of several purchasers, and at last the name of the ultimate purchaser of the shares is handed in by his broker on the "name day" and comes finally to the vendor's broker; the transfer is made by the original vendor to the ultimate purchaser, and all intermediate sales, although they may be numerous, are eliminated, and by novation the only con-

(*s*) 15 and 16 Vict., ch. 86; and see now infra, § 168.
(*t*) See infra, § 168 et seq.
(*u*) Supra, § 140.
(*v*) Holden v. Hayn, 1 Mer., 47; Hall v. Laver, 3 Y. & C. Ex., 191; Shaw v. Fisher, 5 De G. M. & G., 596. And see Stanley v. Chester and Birkenhead Railway Co., 9 Sim., 264; 3 My. & Cr., 773. See, also, infra, § 1018 et seq., as to Novation.

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the court will generally dispense with a proper party, provided the cause be stated in the bill. Breese, 124. The proper time for taking an objection for want of parties, is upon opening the pleadings, and before the merits are discussed. Jones v. Jones, 3 Atk., 111; Darwent v. Walton, 2 Atk., 510; Mechanics' Bank v. Seyton, 1 Pet., 399; Story v. Livingston, 13 id., 359. But it frequently happens after a case has been gone into and thoroughly heard, the court has felt itself compelled to let it stand over for the purpose of amendment. Jones v. Jones, 3 Atk., 111.

tract left standing is between the first vendor and the last purchaser.(*w*)

§ **153**. There are certain cases in which A. contracts with B. for the benefit of C., and C. can sue on the contract. These will be considered in the next chapter.

§ **154**. Another exception arose from the existence of an interest in the estate bought or the money paid derived from a contract anterior to the contract for sale. In these cases the person thus interested in the fruit of the contract appears to have been a proper party to the suit.

§ **155**. Therefore where A. had contracted to purchase an estate from B., having previously agreed with C. to sell the estate to him, and a contract to that effect was afterwards entered into between A. and C., A. and C. subsequently brought a bill for performance against B., and it was held by Knight Bruce (then), V. C., that they were both proper parties.(*x*) The Vice Chancellor considered that Tasker v. Small(*y*) had little or no application to the case before him,(*x*) and appears to have rested his decision on the ground that both the plaintiffs had, at the institution of the suit, an interest in the subject-matter of it.(*z*) And from another case it may be gathered that if A. contracted to purchase from B., and A. then contracted with C. that B. should convey to C., and B. had notice thereof, A. could not enforce the contract against B. without joining C. as a party.(*a*) In like manner a person who by virtue of an antecedent contract with the vendor claimed an interest in the purchase-money was a proper party to a suit for specific performance.(*b*)

§ **156**. In cases of contracts under powers, the question sometimes arose, whether a contract entered into by the donee of the power could be enforced by or against the remainderman, the cases in which he could sue or be sued being, of course, coextensive. The rule by which this question was decided was that the contract was binding in those cases, and those cases only, in which it might have been enforced against the donee of the power himself, independ-

(*w*) Coles v. Bristowe, L. R. 4 Ch., 3; Hawkins v. Maltby, id., 200. And see infra, Part VI, ch. 1, § 1475 et seq.
(*x*) Nelthorpe v. Holgate, 1 Coll., 203.
(*y*) 3 My. & Cr., 63, supra, § 141.
(*z*) 1 Coll., 211.
(*a*) Anon. v. Walford, 4 Russ., 372.
(*b*) West Midland Railway Co. v. Nixon, 1 H. & M., 176.

ently of any conduct on his part.(*c*) The grounds on which part-performance by a tenant for life will not bind the remainderman, will be considered when we come to treat of the principles of that subject.(*d*) It has already been noticed(*e*) that the jurisdiction of courts of equity has, by statute, been excluded in regard to the enforcement of the contracts of a tenant in tail against those in remainder.(*f*)

§ **157**. The question of how far a reversioner can call for the execution of covenants entered into with his predecessor in title is not strictly within the scope of a work on the performance of executory contracts; but it may be worth while to observe that the 32d Hen. VIII, ch. 34, which gives to reversioners the benefit of covenants entered into with their predecessors in title, appears to have authorized a suit in equity for the specific performance of the covenant. As at law,(*g*) so in equity, the statute gives the benefit to the successive reversioners only as they come into possession of the estate; but when thus entitled, they have been held to have a right to the performance of the covenant *modo et formâ*, irrespectively of the damage which may accrue from its breach.(*h*) Nevertheless the reversioner entitled in remainder and not in possession might have a right to enforce the covenant; but this right was not substantiated by the mere existence of the covenant, but depended on the plaintiff showing that he would, as reversioner, sustain some material damage by reason of its breach.(*i*) This followed the analogy of the common law, where the reversioner, to enable him to sue as such, had to show some special damage.(*j*)

§ **158**. In one case vendors, plaintiffs to a bill for specific performance against a purchaser from them, made a sub-purchaser a defendant; and the sub-purchaser then filed his bill against his vendor and the original vendors for specific performance; to this the original vendors objected that they were not proper parties; but it was held that they had pre-

(*c*) Morgan v. Milman, 10 Ha., 279; S. C., 3 De G. M. & G., 24; Lowe v. Swift, 2 Ball & B., 529; and see Affleck v. Affleck, 3 Sm. & G., 394.
(*d*) See infra, § 566.
(*e*) Supra, Part I, ch. 2, § 93.
(*f*) 3 and 4 Wm. IV, ch. 74, § 47.
(*g*) Isherwood v. Oldknow, 3 M. & S., 832.
(*h*) Johnstone v. Hall, 2 K. & J., 414.
(*i*) S. C.
(*j*) Jackson v. Pesked, 1 M. & S., 233; Baxter v. Taylor, 4 B. & Ad., 72; Mumford v. Oxford, etc., Railway Co., 1 H. & N., 34; Simpson v. Savage, 1 C. B. (N. S.), 347; Mott v. Shoolbred, L. R. 20 Eq., 22.

cluded themselves from the objection by the course they had pursued.(*k*)

§ **159**. Where the circumstances of the case were fitting, some might sue for specific performance on behalf of all;(*l*) thus the directors of an unincorporated joint-stock company were allowed to sue on a contract to make a lease to them in trust for the company, without joining all the shareholders.(*m*) But in the converse case, there was great difficulty in applying to specific performance the principle that some might be sued on behalf of all; from the nature of such suits, however, this application of the principle was not often required for the ends of justice. In one case, a joint-stock company established by an act of Parliament, which vested in them all property then belonging to them and authorized them to bring actions in the name of their treasurer, purchased an estate, with notice of a prior contract by the owner to grant a lease of part: on a bill by this proposed lessee against the directors and treasurer, but not the other proprietors, asking for a specific performance of the contract, Grant, M. R., said, that though he could bind the interests of parties not before the court, he could not compel them to do an act, and that the execution of the lease by a few on behalf of all would hardly be sufficient, supposing it proper. He, however, gave the plaintiffs all the relief he could, by enjoining the treasurer from disturbing their possession, though he could not compel specific performance of the contract.(*n*)[1]

(*k*) Fenwick v. Bulman, L. R. 9 Eq., 165.
(*l*) Fenn v. Craig, 3 Y. & C. Ex., 216.
(*m*) Taylor v. Salmon, 4 My. & Cr., 134.
(*n*) Meux v Maltby, 2 Sw., 277. And see Adair v. New River Co., 11 Ves., 429; Att. Gen. v. Mayor and Corporation of Poole, 4 My. & Cr., 17; Pare v. Clegg, 29 Beav., 589; Cullen v. Duke of Queensbury, 1 Bro. C. C., 101; 1 Bro. P. C., 396.

[1] It is clearly the rule that a part may file a bill in behalf of themselves and all others in the same situation. Robinson v. Smith, 2 Paige, 322. So, in Beatty v. Kurtz, 2 Pet., 566, it was held that a part of the persons belonging to a voluntary society, and having a common interest, may sue in behalf of themselves and others having the like interest, as part of the same society, for purposes common to all and beneficial to all. Thus, part of the members of a German Lutheran Society, not incorporated, may file a bill for an injunction to prevent their possession of land dedicated to the use of the society, from being disturbed. Id. And where real estate had been purchased by a joint fund raised by subscription, in shares, by more than 250 subscribers, and the property conveyed to trustees for the stockholders, on a bill for the sale of the premises under a mortgage made by the trustees, it was held to be unnecessary to make the stockholders parties, the trustees sufficiently representing all the interests concerned. Van Vechten v. Terry, 2 John. Ch., 197. In a bill against an unincorporated banking company, the members of which are numerous, and in

§ **160**. There are a few cases in which the strict rule that none but the parties to a suit for its specific performance, appears to have been relaxed in order to avoid multiplicity of suits.[1]

§ **161**. To this principle we may probably refer the case of Lowther v. Viscountess of Andover,(*o*) where a father entered into a covenant with the trustees of his daughter's marriage settlement to endeavor to purchase certain remainders in estates of which he was tenant for life, and, when purchased, to convey them to the uses of the settlement. The covenantor died, having previously entered into a contract for the purchase of the remainders; on a bill filed by the trustees of the settlement against the vendors, and it would seem also the personal representative of the deceased covenantor, specific performance was granted. In another case, where the Duke of Chandos had granted to A. a lease of a lodge, and also the deputation of a keepership in Enfield Chase, and A. assigned, but for part of the term

(*o*) 1 Bro. C. C., 396. As to creditors of a deceased vendor suing, see Johnson v. Legard, T. & R., 281.

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part unknown, it is not necessary to bring all the stockholders before the court, before a decree can be made. Mandeville v. Riggs, 2 Pet., 482. A. filed a bill against B. and the commissioners of the bank of J., to subject the stock of B. in said bank to the payment of a judgment; held, that the stockholders were not necessary parties to the bill. Dana v. Brown, 1 J. J. Marsh., 304. Where some twenty-eight persons are associated together for the purpose of trade, the legal title to all their property, being in a part of them for the benefit of the whole, it is sufficient if those having the legal title be made parties defendant or complainant in a bill in equity. Martin v. Dryden, 1 Gilm., 187. But a bill will not lie by a freeholder or inhabitant of a town, respecting its common property, without the consent of the town, duly declared. Denton v. Jackson, 2 John. Ch., 320. The officers of a bank are, individually, not proper parties to a bill brought to enforce a demand against the corporation; and the bill should be dismissed on demurrer. Wood v. Bank of Kentucky, 5 Monr., 194, and Atterbury v. Knox, 8 Dana. 282, are authorities to the effect that where the allegations to a cross bill are, that the complainant was the agent of a foreign bank, doing banking business in Kentucky contrary to the laws of Kentucky, exacting more than legal interest, the bank should have been made a party, and that it was erroneous to try the cause without it. In these cases it is no objection that the trustee and *cestui que trust* unite in the same bill. So, where trustees filed a bill without disclosing their beneficiary, and afterwards filed a supplemental bill, disclosing the fact that they were trustees of the United States Bank, and praying that it might be made a party complainant to the bill and also an amended supplemental bill, disclosing that the bank had gone into liquidation, and that certain persons were appointed assignees, and praying that they might be made parties complainant; it was held, that all those persons constituted, in law, but one, representing the interests of the bank. Hitchcock v. United States Bank, 7 Ala., 387.

[1] *Where, in order to avoid a multiplicity of actions,* the plaintiff must, as a general rule, first establish his right at law, before the court will interfere to enforce a contract. Pen. Co. v. Delaware Co., 31 N. Y., 91.

only, to B., B. was allowed to maintain a bill against the duke and A. for the rectification of a mistake in the original grant by the duke, and for a new and sufficient grant by him.(*p*)

§ **162**. The same principle is illustrated by another case, in which a bill was filed by a purchaser against trustees for sale, to enforce the specific performance of a contract for the sale of lot A.; it was resisted on the ground that by an arrangement, to which the plaintiff was a party, part of that lot as originally described was taken from it and given to the adjoining lot B. The bill was amended to put in issue this averment, which came out in the answer, but without adding as defendant the purchaser of lot B.; and the court held that he ought to have been made a defendant, for otherwise the vendors would be exposed to another suit from the purchaser of lot B.(*q*)[1]

§ **163**. And where there were claims made by persons, strangers to the contract, adversely to both the parties to it, they might under some circumstances be made defendants to a suit for the performance of it. Thus, where an assignee under an insolvency sold a reversionary interest in stock of the insolvent, and the purchaser was served with notice not to pay the purchase-money to the assignee by a person claiming under a previous assignment by the insolvent subsequent to his insolvency, a bill was brought against the assignee and the adverse claimant, and prayed an inquiry

(*p*) Jalabert v. Duke of Chandos, 1 Eden, 372.

(*q*) Mason v. Franklin, 1 Y. & C. C. C., 239.

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[1] White v. Watkins, 23 Mo., 423. A *cestui que trust* is not a proper party to an action brought by a trustee to enforce specific performance of an agreement to convey land, even where the money paid on the contract was a trust fund. Gibbs v. Blackwell, 37 Ill., 191; see, as to making trustees parties, Evans v. Jackson, 8 Sim., 217; Saunders v. Richards, 1 Coll. C. C., 568; Fleming v. Holt, 12 W. Va., 143; Morrow v. Laurrence, 7 Wis., 574. A wife requested her husband to enter into a written contract for the sale of land held by him in trust for her. Held, no error to decree that he could convey the land free from her right of dower, notwithstanding she opposed the decree, she was not necessarily a party. Rostetter v. Grant, 18 Ohio., 126; Chapman v. Wilbur, 4 Oregon, 362. When real estate is conveyed in mere execution of a trust, it is unnecessary to make the vendor's representatives parties to the action. Downing v. Risley, 15 N. J. Eq., 93. The legal title was vested in the trustee merely to secure the payment of a given sum to a third person. Held, in an action by the equitable owner to redeem, that such third person was not a necessary party. Smith v. Sheldon, 65 Ill., 219.

into the rights of the latter; he was, in the event, decreed to pay costs.(*r*)

§ **164**. And so, in the case of purchases from a voluntary settler, where the contract was enforced by a purchaser, it seems to have been proper to make defendants, not only the vendor, but the trustees of the settlement and the persons beneficially interested under it(*s*)—the question whether the purchaser was entitled to have the contract performed depending on whether the previous settlement was or not void against him, and that being a question which could not be tried in the absence of those who were interested under the settlement alleged to be voluntary. "I see no reason," said Turner, L. J.,(*t*) "why it shall not be tried in a suit for specific performance, rather than be made the subject of a distinct and separate suit, the more so as it is a question which affects the validity no less than the performance of the contract."

§ **165**. Where the several purchasers of several lots had been joined as defendants in one suit, a demurrer for multifariousness was repeatedly allowed.(*u*) "Suppose," said Lord Kenyon, M. R.,(*v*) "an estate is sold in lots to different persons, a plaintiff could not include them all in one bill for a specific performance, for each party's case would be distinct and would depend upon its own peculiar circumstances; and there must have been a distinct bill upon each contract." And a bill by several purchasers against one vendor would have been equally multifarious.(*w*)

§ **166**. But in one case in which there had been several sales of a like kind, and several purchasers joined as plaintiffs, and the difficulty in completing the sale arose from the same cause in each case, and the persons interested in the estate made no objection for multifariousness, the court decreed specific performance of the different contracts in one suit.(*x*) And where the purchaser had entered into two

(*r*) Collett v. Hover, 1 Coll., 227, before Lord Cottenham, and cf Delabere v. Norwood, 3 Sw., 144 (annuitants); Wilson v. Thomson, 23 W. R., 744.

(*s*) Holford v. Holford, 1 Ch. Ca., 217; Buckle v. Mitchell, 18 Ves., 100; Willats v. Busby, 5 Beav., 193; Lister v. Turner, 5 Ha., 281; Daking v. Whimper, 26 Beav., 568.

(*t*) In Townend v. Toker, L. R. 1 Ch., 457.

(*u*) Rayner v. Julian, 2 Dick., 677; Att.-Gen. v. Mayor, etc., of Poole, 4 My. & Cr., 17; Brookes v. Lord Whitworth, 1 Mad., 86; Turner v. Robinson, 1 S. & S., 313; Inman v. Wearing, 3 De G. & Sm., 729.

(*v*) In Rayner v. Julian, 2 Dick., 677.

(*w*) See Hudson v. Maddison, 12 Sim., 416.

(*x*) Hargreaves v. Wright, 10 Ha. Appx., 56 In this case the bill was originally filed by two of the purchasers *on behalf* of themselves and the other purchasers, and the court (Turner, V. C.), refused to entertain the suit in that form, but gave liberty to amend by adding other purchasers as co-plaintiffs. Consider Turner v. May, 32 L. T., 56.

separate but simultaneous contracts (for the purchase of freeholds and leaseholds) with the same vendor, and the investigations of the two titles had gone on concurrently, Kindersley, V. C., considered that the vendor was right in making both contracts the subjects of one suit for specific performance.(*y*)

2. *As regards the practice of the high court.*

§ **167**. No doubt the general rule will still continue to be that the parties to the contract are the necessary and sufficient parties to the action, for that is a rule of convenience and good sense.

§ **168**. But the fact that persons may be joined as plaintiffs whose claims are alternative, or some of whom are found to have no interest in the litigation, or that a defendant is not interested in all the relief claimed now furnishes no defense; (*z*) and the plaintiff may unite in the same action, and in the same statement of claim, several causes of action, subject to a power in the court or judge to direct separate trials of the separate causes.(*a*) Further, the court or a judge may at any stage of the proceedings order the name of any party, plaintiff or defendant, who ought to have been joined, or whose presence before the court may be necessary, in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the action, to be added; (*b*) and as regards the defendant, where he claims to be entitled to any remedy or relief over against any other person, or where from any other cause it appears to the court or judge that a question in the action should be determined not only as between the plaintiff and defendant, but as between the plaintiff, defendant and any other person, or between any or either of them, the court or a judge may, on notice being given to such last-mentioned person, make such order as may be proper for having the question so determined; (*c*) and where a defendant claims to be entitled to some remedy or relief over against a person not a party to the action, he may, by

(*y*) Royou v. Paul, 28 L. J. Ch., 556.
(*z*) Ord. XVI, rr. 1, 4 and 13. Cf. Cox v. Barker, 3 Ch. D., 359.
(*a*) Ord. XVII, r. 1. See Flower v. Buller, 15 Ch. D., 665.
(*b*) Ord. XVI, r. 13. See Long v. Crossley, 13 Ch. D., 388.
(*c*) Ord. XVI, r. 17.

leave of the court or a judge, issue and serve on such person a notice, stating the nature and grounds of the claim; (*d*) and the Rules of the Supreme Court provide in detail (*e*) for the conduct and effect of the proceedings in the action with respect to third parties served with either of these notices.

§ **169**. Where, therefore, the adverse claim of a third person is strictly a question in the action, as, for instance, where the question is one of title dependent on the validity of the claim of a third party, the court has the power to invoke the attendance of that third party, and finally to settle the controversy; and no doubt this power will be extensively exercised. Where, on the other hand, the question between a plaintiff or defendant and the third party is not strictly a question involved in the action, the third party cannot be called in.

§ **170**. In a case where the defendants (vendors) alleged that a bare trustee for them had occasioned the suit by refusing to concur in the conveyance, the Court of Appeal (the plaintiffs concurring in the application) gave the defendants leave to serve the trustee with notice (under Ord. XVI., r. 18) of the suit.(*f*)

§ **171**. But where the defendants (purchasers from the mortgagee of property mortgaged by the trustee and executor of a will) having, after accepting the title, received notice from unpaid residuary legatees under the will of a claim by them to the property, moved to have these legatees made parties to the action, the motion was refused with costs, on the grounds that there was nothing in the notice given by the legatees to prevent a decree being made which would bind both vendor and purchasers, and that the legatees were not parties whose presence was necessary in order to enable the court effectually and completely to decide all questions involved in the action.(*g*)

§ **172**. The new procedure, by way of counterclaim, affords another mode in which, in a proper case, a person who was not a party to the original action may be brought into the proceedings.

(*d*) Ord. XVI, r. 18.
(*e*) Ord. XVI, rr. 19-21.
(*f*) Treleven v. Bray, 1 Ch. D., 176, and 2 id., 724.
(*g*) Harry v. Davey, 2 Ch. D., 721.

Thus, where second mortgagees brought an action against first mortgagee, who had contracted to sell the mortgaged property under his power of sale, claiming to have the sale completed and the sale moneys applied in satisfaction of the mortgagees, and the defendant delivered a counterclaim, to which he made the purchaser a co-defendant with the original plaintiffs, alleging that the concurrence of the latter in the sale was a term of the contract, and claiming specific performance; Hall, V. C., held that the purchaser was properly made a party to the counterclaim.(*h*)

§ **173**. In actions for the specific performance of contracts relating to land or a charge registered under the land transfer act, 1875, the court has a special statutory power of bringing into the action any persons who have registered estates or rights in such land or charge.(*i*)[1]

(*h*) Dear v. Sworder, 4 Ch. D., 476.

(*i*) 38 and 39 Vict., ch. 87, § 93, infra, §§ 878, 1110.

[1] *Rule as to parties having an interest in the subject of the agreement.*] Where an estate has been made the subject of a contract of sale, all parties interested in such estate are proper parties in an action for specific performance. Williams v. Leach, 28 Pa. St., 89; Seager v. Burns, 4 Minn., 141. All must join in the action. Slaughter v. Nash, 1 Litt. (Ky.), 322; Rochester v. Anderson, 6 id., 143; Speri v. Robinson, 9 How. Pr., 325; McCotter v. Laurrence, 6 Thomp. & Cook, 392; 4 Hun, 107; Lavender v. Thomas, 18 Ga., 668; Craig v. Smith, 96 Ill., 469; Flemming v. Holt, 12 W. Va., 143. The appellate court will reverse, if indispensable parties are omitted, even when the objection was not raised in the court below. Watson v. Oates, 58 Ala., 647. In Guard v. Bradley, 17 Ind., 60, it was held, that an infant could maintain a bill for specific performance, where the party who contracted in the infant's behalf was competent, and a full consideration had been paid. Specific performance of an agreement for the sale of land was sought by persons who were not parties to it, but had become vested with certain rights subsequent to the making of the contract. Held, that they were proper parties to an action to determine the rights of the parties thereto. Curran v. Holyoke Water Power Co., 116 Mass., 90. While an action was pending to enforce specific performance, the respondent conveyed the premises to a third party, and a decree of performance was entered without bringing in such third party. The decree was reversed on appeal. Casady v. Scallen, 15 Iowa, 93.

Rule as to adverse claimants.] Where a party has adverse or inconsistent rights in the subject matter of the suit, he cannot be made a party plaintiff. Grant v. Schoonhoven, 9 Paige's Ch., 225. In Hanchett v. McQueen, 32 Mich., 22, it was held that where the interests of the vendee, his wife and his assignee for creditors are conflicting, the vendor, in his bill for specific performance, might ask to have the respective rights of the claimants determined. Where the decree cast a cloud upon title—Held, that one who claimed title under the vendor, might come in and be made a party. Carter v. Mills, 30 Miss , 432. A. purchased real estate at sheriff's sale, and brought an action to compel a conveyance from the sheriff; the former owner claimed a right of redemption. Held, that he had a right to be joined as party defendant. Crosby v. Davis, 9 Iowa, 98. An action was brought for the specific performance of a contract to convey an undivided interest in land. Held, that those who are subject to the complainant's equity, and hold adversely to him, are necessary parties. Agard v. Valencia, 39 Ala., 292.

CHAPTER II.

OF A STRANGER TO THE CONTRACT.

§ **174**. Can a stranger to the contract sue, or be sued, for its performance?

It will be convenient to consider the two branches of this question separately.

1. *As to a stranger suing.*

§ **175**. It is a general principle both at common law and in equity, that a stranger to the contract cannot sue on it; and this is not varied by the mere fact that the stranger takes a benefit under it.(*a*)[1]

§ **176**. Thus in a case, where protracted litigation had been undertaken by A. for the recovery of an estate, and in

(*a*) Crow v. Rogers, 1 Str., 592; Ex parte Peele, 6 Ves., 602, 604; Ex parte Williams, Buck, 13; Berkeley v. Hardy, 5 B. & C., 355; Lord Southampton v. Brown, 6 id., 718; per Lord Langdale, M. R., in Colyear v. Countess of Mulgrave, 2 Ke , 98; per Cotton, L. J., in Re D'Angibau, 16 Ch. D., 242; Hill v. Gomme, 5 My. & Cr., 250, 256; Chesterfield, etc., Colliery Co. v. Hawkins, 3 H. & C , 677. The dicta of Eyre, C. J., in Fellmakers' Co. v. Davis, 1 B. & P., 102, and of Buller, J., in his N. P., 134, do not appear to be law. The Scotch law differs from ours in this particular, recognizing the *jus quæsitum tertio*. Stair Inst., B. 1, t. 10, § 5.

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[1] One who claims an adverse interest, which was vested in him previous to the agreement, is not a necessary party. Smith v. Sheldon, 65 Ill., 212; aff'g S. C., 44 id., 68. During the pendency of an action for the specific performance of a contract to convey property, creditors of the vendor obtained judgment against him and sold such property. Held, that neither the creditors nor purchasers were necessary parties. Lecombe v. Sheldon, 20 How., 94. A stranger to the agreement claimed an interest in the purchase money. Held, that he might be made a party to the suit. Moon v. Wilkerson, 47 Miss., 633; Kimbrough v. Curtis, 50 id., 117; Boyce v. Francis, 56 id., 573. A third party, to whom the vendor had conveyed, and who had promised to pay the original vendor, was held to be a proper party defendant. Campbell v. Patterson, 58 Ind., 66. In a proper case, a part may file a bill for specific performance for all; *e. g.*, the directors of a stock company may act for the stockholders and need not join them all. Dana v. Brown, 1 J. J. Marsh, 304; Robinson v. Smith, 3 Paige's Ch., 322; Reese v. Police of Lee Co., 49 Miss., 639.

Upon the same principle of privity an analagous case was decided in Pennsylvania. Where a widow executed an instrument, "To all whom these presents shall come," and purporting to be a general release of dower, it was held, that a son of the deceased, although not a party to the instrument, had, nevertheless, such an interest as would entitle him to the benefit of the release. Gray v. McCune, 11 Harris, 447. In Louisiana, under the civil law, the doctrine of privity is carried very far, and children, to the extent of the *legitime*, are not considered as heirs, but as creditors of their father's estate. Vide Succession Trimmel, decided in 1854. Opinion Book 24, page 328; Maples v. Mitty, 12 La. An., 759.

the course of these proceedings A. became greatly indebted to his solicitor, and, by a contract between A. and his brother B., A. agreed to relinquish his interest in the estate to B., in consideration of B.'s undertaking to pay the costs already incurred with interest, it was held,(*b*) that the solicitor, being no party to the contract, and having given no consideration for it, could derive no benefit under it capable of being enforced by him.[1]

§ **177**. There are, however, several apparent exceptions to this principle.

§ **178**. Thus (1) there may be cases in which, where A. has, as a trustee for B., contracted with C., B. may be entitled to sue both C. and A. for performance of the contract. The case of Touche v. Metropolitan Railway Warehousing Co., is a case of this sort.

§ **179**. (2) There are cases of agency which may wear the aspect of exceptions to the rule. In Hook v. Kinnear(*d*) the two defendants were tenants in common of certain lands, and the defendant Kinnear, having been tenant of the defendant Philips' moiety, and in arrear to him for the rent, agreed with Philips to execute to the plaintiff such lease of the entire premises as Philips and the plaintiff should agree upon, and that all the rent should be paid to Philips till the arrears due to him were satisfied. The plaintiff was

(*b*) Moss v. Bainbrigge, 18 Beav., 478, 482; S. C., on appeal, 6 De G. M. & G., 292.

(*c*) L. R. 6 Ch., 671. Distinguish Re Empress Engineering Co., 29 W. R., 342.

(*d*) 3 Sw., 417, n.

[1] In the construction of an athenæum in Maryland, a subscription book was purchased, containing the name of the plaintiff as treasurer of the fund to be collected; also the names of six others as a building committee, with authority to call in the subscription in such installments as might be required in the course of construction. A resolution of the committee afterwards called in the unpaid subscriptions, "payable to the plaintiff." Held, that the plaintiff could not maintain an action against a delinquent subscriber in his own name. Gittings v. Mayhew, 6 Md., 113. Upon an agreement by one person to become responsible for another for a part of the proceeds of an expected sale, an action by a third person will not lie, although the consideration moved from the third party. Tewksbury v. Hayes, 41 Me., 123. But it is also held, in the same State, that where a party, for a valuable consideration, stipulates with another by simple contract, to pay money, or do some act for the benefit of a third person, such third person, if there be no other objection than want of privity between the parties, may maintain an action for the breach of the engagement; or he may, if he choose, disregard it, and seek his remedy directly against the party with whom his contract primarily exists. Bohanan v. Pope, 42 Maine, 193. If A. contract to support B., and fraudulently refuse to fulfill his agreement, whereby B. becomes chargeable to the town, this does not entitle the town to proceed against A. in law or equity, although the original contract was intended to defraud some other party. Milton v. Story, 11 Verm., 101.

no party to the contract; Philips entered into another contract with the plaintiff for a lease of the premises to the plaintiff at £30 per annum, and executed a lease of his moiety at £15 per annum; the defendant declined to do the same in respect of his moiety, and it was objected that the plaintiff as a stranger could not sue; but Lord Hardwicke overruled the objection, on the ground that Philips might be taken as the agent of the plaintiff in the contract with Kinnear, and compared it to the case of stewards entering into contracts, and their masters enforcing them.

§ **180**. (3) There are cases of persons claiming benefits under deeds who are not parties to the deeds;(*e*) of persons suing for the execution of the trusts of marriage settlements who are not parties to such settlements,(*f*) and of proceedings by children under contracts antecedent to the marriages of which they are the issue. But these either refer to executed and not to executory contracts, or attract the jurisdiction of the court on grounds other than that of the specific performance of contracts resting in *fieri*.

§ **181**. (4) There is a class of cases where the nearness of relationship of one party to the contract with the party to be benefited by it was supposed to give to the latter the benefit of the consideration and a right to sue on the contract. The Physician's case(*g*) was the leading authority on this point. There A. made a promise to his physician, that, if he would effect a certain cure, he would pay a sum of money to the physicians's daughter; and it was held that she might sue. In another case in *assumpsit* the plaintiffs, who were husband and wife, declared that the wife's father, being seized of lands which had subsequently descended to the defendant, was about to fell £1,000 worth of timber to raise a portion for his said daughter; and the defendant promised the father that, if he would forbear to fell the timber, he would pay the daughter £1,000. A verdict was found for the plaintiffs; but it was moved, in arrest of judgment, that the father alone could have brought the action, but not the husband and wife; but, after two arguments, the objection was overruled on the ground of

(*e*) 8 and 9 Vict., ch. 106, § 5.
(*f*) Cf. Re D'Angibau, 15 Ch. D., 228, 242, and supra, § 92.
(*g*) Cited 1 Ventr., 6.

the nearness of relationship.(*h*) But these cases were in the year 1861 considered and deliberately disapproved by the court of Queen's Bench, and can no longer be considered law.(*i*)[1]

§ **182.** (5) It seems that an exception may arise to the general principle that a stranger even though taking a benefit under a contract cannot sue on it, in cases where the contract is of such a nature and has been so far acted upon as to change the condition in life of the stranger, and to raise in him reasonable expectations grounded on the contract.[2] Such a case might be presented by a contract between A., a rich man, and B., a poor one, that A. should take B.'s child, bring him up as a gentleman, and leave him certain property, and a part performance of this on A.'s part. But here, any right which the child of B. might have to insist on the contract is derived, not from the contract alone, but from the conduct of A. in pursuance of it, and the wrong which the child would sustain, if the contract were carried out in part and not in whole. For no such equity would exist where the contract remained entirely in abeyance.(*j*)[3]

(*h*) Dutton v Pool, 1 Ventr., 318, 332; 2 Lev., 210, affirmed in Cam. Scac. T. Raym., 302; per Lord Mansfield, C. J., in Martyn v. Hind, Cowp., 443.

(*i*) Tweedle v. Atkinson, 1 Best & Sm., 393.

(*j*) Hill v. Gomme, 1 Beav., 540; 5 My. & Cr., 250; Lyons v. Blenkin, Jac., 245.

[1] *Rule as to relationship.*] The rule appears to be that a relationship which is more remote than that of parent, child or wife, carries with it no moral obligation upon which a court of equity will found a decree for the specific performance of a mere executory contract. Bufford v. McKee, 1 Dana, 107; Hays v. Kershom, 1 Sandf. Ch., 258; Reed v. Manarsdale, 2 Leigh., 569; Caldwell v. Williams, Bailey Ch., 175; Chandler v. Neale, 2 Hen. & Mumf., 124; Parker v. Carter, 4 id., 273; Hawrey v. Alexander, 1 Rand., 219.

[2] In New Jersey it was held, that where an infant child was taken by an uncle, under an agreement between the father and such uncle that such child should be adopted as his own, and the child lived with the uncle twenty five years, and had no share in his father's estate. Held, that the child might maintain an action to enforce the agreement. Van Dyne v. Vreeland, 11 N. J. Eq. (3 Stock.), 270.

[3] Limitations in marriage settlements to collateral relations have been repeatedly held, in England, to be voluntary. Reeves v. Reeves, 9 Mod., 132; Johnson v. Legard, 3 Ves., 352; Cormick v. Trapaud, 6 Dow., 36. So, for example, limitations to collaterals, in a marriage settlement, made by a tenant in tail, are voluntarily against a subsequent purchaser for a valuable consideration, in the same manner as if the settler had had the fee. Cormick v. Trapaud, 6 Dow., 36. Limitations in favor of issue of a second marriage seem to stand upon a different footing and to be held good. Clayton v. El Hilton, cited 3 Madd., 362; Ithell v. Beane, 1 Ves., 216.

That the doctrine of privity in respect to collaterals has been carried to the same extent in this country as in England, is evidently not the case. The subject has come but seldom before the courts, and was for a time a much mooted point; but it now seems clearly to be established that collateral consanguinity

2. *As to a stranger being sued.*

§ **183**. Generally a stranger to the contract is not a proper defendant to an action for enforcing it.(*k*) But this general rule is subject to exceptions.

§ **184**. If a stranger to the contract gets possession of the subject-matter of the contract with notice of it, he is or may be liable to be made a party to an action for specific performance of the contract upon the equitable ground of his conscience being affected by the notice.

§ **185**. Thus, where S. contracted with P. for the sale to

(*k*) See supra § 140, and per Stuart, V. C., in Bishop of Winchester v. Mid Hants Railway Co , 21, and West Midland Railway Co. v. Nixon, 1 H. & M., 176. The case may be different where the action is for rescission. See Aberaman Ironworks v. Wickens, L. R. 4 Ch., 111.

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is not a meritorious consideration, upon which a court of equity will specifically enforce an executory covenant or agreement. The case of Buford's Heirs v. McKee, 1 Dana, 107, in the Court of Appeals in Kentucky, is directly in point. The defendants took the land by devise from one who in his life-time had executed a covenant to Buford (who was his nephew), to convey the same land to B. at the covenanter's death. On a bill by B.'s heirs for the specific performance of the agreement, it was refused by the court, on the ground that the covenant was voluntary, and that the relationship between the parties did not constitute a meritorious consideration. And in Hayes v. Kershaw, 1 Sandf. Ch., 258, the assistant vice-chancellor, after quoting "Buford's Heirs v. McKee" with approbation, decided that relationship, such as that of a brother, nephew, neice, etc., did not constitute a good consideration; that it carried with it no moral obligation as that of providing for a wife or children, or parent, upon which a court of equity would found a decree for specific performance of a covenant. In Maryland it has been decided, that the consideration of mutual love and affection is sufficient in a deed; but a mere executory contract which requires a consideration as a promissory note, cannot be supported on the consideration of blood or mutual love and affection; something more is necessary—some valuable consideration—or it cannot be enforced at law or in equity. Pennington v. Gittings, 2 Gill. & John., 208. In Virginia, a son and son-in-law promised in writing to pay a debt held against the estate of their deceased father and father-in-law. Neither of them was executor, and it did not appear that there was any deficiency of assets for the payment of debts, or that either of them had any larger portion of the estate than the other children. Held, that the promise was *nudum pactum*. Chandler v. Neale, 2 Hen. & M., 124; Parker v. Carter, 4 Mun., 273. A. being wealthy and childless, verbally promised his brother B , who was poor and had many children, that if he would not remove to the west country, but would move to and settle on a lot of land of A. he would convey it to him. B. accepted the offer, and took possession of the land; held, that the promise was not supported by either a valuable or meritorious consideration, and would not be specifically enforced against the heirs of A. Reed v. Vannorsdale, 2 Leigh, 569. In Caldwell v. Williams, Bailey's Ch., 175, it is said, that "no agreement can be enforced, either in law or in equity, which is not founded on a consideration." Some agreements which are termed voluntary, are executed in equity, when made in favor of a wife or children; but this is done only where the instrument is under seal, which imports a consideration, and renders the agreement valid at law; and there is no instance of an agreement being enforced, which is not only voluntary in the equity sense of the word, but also *nudum pactum* at law. The rule, in this country, seems to have never been extended to relations more remote than children or wife. See, also, Hawey v. Alexander, 1 Rand., 219.

him of an estate, and afterwards conveyed it to C., who, at the time of the conveyance, had notice of P.'s contract, on a bill filed by P. against S. and C. for the enforcement of the contract between S. and P., Wigram, V. C., decreed specific performance of that contract, ordered all necessary parties to convey the estate to P., and gave the plaintiff costs against both S. and C.(*l*).

§ **186**. Again, a stranger to the contract may so mix himself up with it by setting up a claim to some benefit resulting from it, as to render himself liable to be made a party to proceedings for the enforcement of the contract: as, for instance, by claiming to be interested in the purchase-money under an arrangement antecedent to the contract.(*m*)

§ **187**. In some cases where a portion of the relief claimed might affect the person in actual possession of the property, that person may properly be made a party to an action for the specific performance of the contract: as, for instance, where the purchasers, a railway company, being in possession of the land contracted to be purchased leased it to another railway company, who opened and worked a railway over it, and the unpaid vendors filed their bill against both companies for performance of the contract, declaration of the vendors' lien, and the appointment of a receiver.(*n*) "Ordinarily," said Stuart, V. C.,(*o*) "a person not being a party to the contract ought not to be brought before the court. But it is otherwise where possession is sought by the bill, and the person in possession will be affected by the decree. Therefore the South Western Company (the lessees) have been properly brought here."

§ **188**. Lastly, there are provisions in the rules by which the present practice of the court is regulated,(*p*) and in the land transfer act, 1875,(*q*) by virtue of which strangers to the contract may, in certain cases, be brought into the position of defendants to an action for enforcing its specific performance.

(*l*) Potter v. Sanders, 6 Ha., 1; cf. Daniels v. Davison, 17 Ves., 433; Holmes v. Powell, 8 De G. M. & G., 572; and distinguish Lenty v. Hillas, 2 De G. & J., 110; Fenwick v. Bulman, L. R. 9 Eq., 165.

(*m*) West Midland Railway Co. v. Nixon, 1 H. & M., 176. Consider Muston v. Bradshaw, 15 Sim., 192, where the interest claimed was created subsequently to the contract, and cf. Aberaman Ironworks v. Wickens, L. R. 4 Ch., 101; Wilson v. Thomson, 23 W. R., 744.

(*n*) Bishop of Winchester v. Mid-Hants Railway Co., L. R. 5 Eq., 17. Cf. Churchill v. Salisbury and Dorset Railway Co., 23 W. R., 534, 894.

(*o*) L. R. 5 Eq., 21.

(*p*) See § 168 et seq.

(*q*) See §§ 173, 1110.

CHAPTER III.

OF THE DEATH OF A PARTY TO THE CONTRACT.

§ **189**. The general rule, that parties to the contract must alone be parties to the action, is further modified by certain circumstances, one of which, namely, the death of a party to the contract, will now be considered. By this circumstance, with the exception to be mentioned hereafter,(*a*) the obligation to perform, and the right to call for the performance of, the contract devolve on the representatives of the party dying.

§ **190**. If the vendor of real estate die before completion, the contract may be enforced either by the purchaser,(*b*)[1] or by the personal representative of the vendor;(*c*)[2] but in both cases the heir(*d*) or devisee(*e*) must be a party,[3] as having an

(*a*) See infra, § 199.
(*b*) Hinton v. Hinton, 2 Ves. Sen., 631; Barker v. Hill, 2 Rep. in Ch., 218.
(*c*) Baden v. Countess of Pembroke, 2 Vern., 212.
(*d*) Roberts v. Marchant, 1 Ha., 547; S. C., 1 Ph., 370; Lacon v. Mertins, 3 Atk., 1; Hoddel v. Pugh, 33 Beav., 489 (costs); cf. Longinotto v. Morss, 26 L. T., 828 (lease).
(*e*) Galton v. Emuss, 1 Coll., 243; Hale v. Bushill, 35 Beav., 343; Purser v. Darby, 4 K. & J., 41 (costs). See, too, London and South-Western Railway Co. v. Bridger, 12 W. R., 948. As to the *cestuis que trust* of real estate devised in trust, see 15 and 16 Vict., ch. 86, § 42, r. 9; Ord. XVI, rr. 7, 11.*

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* Where an objection is taken at the hearing, to the omission of a party as *cestui que trust*, by the defendant, he must show clearly the existence of the interest at the commencement of the suit; and the court is not bound to take notice of any interest in the subject of the suit, acquired by purchase since the suit was commenced. Cook v. Mancius, 5 John. Ch., 59.

[1] Newton v. Swazey, 8 N. H., 9; Glaze v. Drayton, 1 Dessau., 109; S. P., Wilkinson v. Wilkinson, 1 id., 201.

[2] A. sold a tract of land to B., a conveyance to be made on the payment of the second installment. A. became insane before the time arrived on which he was to convey, and died, leaving a widow and infant heirs, and a deed was made under order of the court. On a bill filed by the administrator and heirs of A. for specific execution, it was held, that the complainants not having conveyed was no objection to the bill; and that B. having had the use of the land, must pay interest on the purchase money, which could not be avoided by a tender to the wife, on condition of making title, in the absence and derangement of A. Boyce v. Prickett, 6 Dana, 231.

[3] Where a vendor of lands holds notes for the purchase money, and assigns the notes, he transfers thereby his lien on the land to the assignee. The heirs of the assignor are necessary parties to a bill by the assignee to subject the equity of the vendee to satisfaction of the judgment on the notes; and where they were not made parties, time will be allowed to bring them before the court. Edwards v. Bohanan, 2 Dana, 97; Steele v. Steele, 4 J. J. Marsh., 231. In Lansdale v. Cox, 7 J. J. Marsh., 391, A. and B. being sureties in a bond, A. was obliged to pay the whole amount, and (the principle being insolvent)

interest in disputing the contract;[1] and it makes no difference that the legal estate is outstanding in a trustee.(*f*) As

(*f*) Roberts v. Marchant, 1 Ha., 547; 1 Ph., 370. Distinguish Fowler v. Lightburne, 11 Ir. Ch. R., 495, 500.

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brought this suit against the administrator and heirs of B. Held, that the heirs and devisees of two deceased children of B. should have been made parties. See Triplet v. Hill, 7 J. J. Marsh., 432. In Kenny v. Collins, 4 Litt., 289, A. brought his bill against B., alleging a purchase of land by C. from D., and a receipt of a bond from D. for the title; that C. sold the land to E., taking E.'s bond for the price, which bond was assigned to the complainant—that E. had died without having disposed of the land; and that B. intermeddling with E.'s estate, had become executor in his own wrong and had fraudulently obtained a deed of the land in his own name. The bill asserted a lien on the land, and prayed for a sale. Held, that A. was entitled to the benefit of C.'s lien on the land, but that the heirs of E. were necessary parties to the suit, and that the bill should be dismissed without prejudice. Carr v. Callaghan, 3 Litt., 365; Berry v. Berry, 3 Monr., 368. The widow and heirs of a deceased person sold lands of the estate, gave a bond for title, and took notes for the purchase money, in the name of the widow only. Held, that the heirs were necessary parties to a bill by the widow to compel payment of the purchase money, and that a sale of the land, under a decree in a suit by the widow alone, would not pass the title. Alexander v. Perry, 4 Humph., 391. In Lee v. Marshall, 2 Monr., 30, it is decided that all the devisees must be made parties to a bill to enjoin executors from selling land belonging to the testator's estate. But the heirs of a devisor, who has devised lands to other persons, are not necessary parties to a suit for the land, under adverse claims. Meriwether v. Hite, 2 A. K. Marsh., 181. And in Georgia, the lands of a deceased debtor are liable in equity for the payment of his debts, without making the heirs a party to the suit. Telfair v. Ral, 2 Cranch, 407. In New York, where a debt is specifically charged by the will of the testator upon certain real estate, such real estate is the primary fund for the payment of such debts, and the heirs at law are not necessary parties to the suit. Smith v. Wyckoff, 11 Paige, 49.

[1] Lacon v. Meetins, 3 Atk., 1; Galson v. Emuss, 1 Coll. C. C., 243; Rutherford v. Green, 2 Ired. Ch., 121; Jacobs v. Locke, id., 286; Craig v. Johnson, 3 J. J. Marsh., 592; Glaze v. Drayton, 1 Dessau.'s Eq., 109; Morgan v. Morgan, 2 Wheat., 290; Buck v. Buck, 11 Paige Ch., 170; Robinson v. McDonald, 11 Tex., 385; Burger v. Potter, 32 Ill., 66; Moore v. Murrah, 40 Ala., 573; Newton v. Swazey, 8 N. H., 9; S. C., 9 id., 385; to the contrary, see Shannon v. Taylor, 16 Tex., 412. The object of making the heirs or devisees parties, being to divest them of the legal title which immediately vests in them upon the death of their ancestor, and which they were bound to convey to the vendee in a proper case. Mitchell v. Shell, 49 Miss., 118. New York State provides, by statute, that the "supreme court or county court shall have power to decree and compel a specific performance by any infant heir, or other person, of any contract or agreement made by any party who may die before the performance thereof; on the petition of the executors or administrators of the estate of the deceased, or of a person or persons interested in such contract, bargain or agreement, see N. Y. Rev. Stat. (6th ed.), p. 200, § 113. Where the executors have power to sell, or there are devisees, the heir need not be made a party unless there is reasonable ground to deny the validity of the will. Spier v. Robinson, 9 How. Pr., 325; West Hickory Mining Ass. v. Reed, 80 Pa. Stat., 38. In Iowa the statute makes the executor or administrator a proper party to an action to enforce specific performance of the contract of a deceased vendor, still it does not make him a necessary party. Rev. Stat. of Iowa, §§ 2460, 2461; Judd v. Morely, 30 Iowa, 423. A bill was brough to compel specific performance of an agreement to assign, by one of the distributees of an estate, of all his interest in the undivided assets in the administrator's hands. Held, that all the distributees are necessary parties. Bogan v. Camp, 30 Ala., 276. All the co-heirs of a deceased vendor should join in a bill for specific performance of a contract for the mutual sale of land. Where one of the parties has died, his death should be proved, excusing the omission of not making him a party to the bill. Morgan v. Morgan, 2 Wheat., 290.

a purchaser has no right to insist on having the will proved against the heir, he is not a necessary party where there are devisees of the estate in question.(*g*)

§ **191**. Formerly, where the heir was an infant, a difficulty arose;(*h*) but this has been overcome by the seventh section of the trustee act, 1850, by virtue of which, where an infant is seized or possessed of any lands upon any trust, it is lawful for the court to make an order, vesting such lands in such person or persons in such manner and for such estate as the court shall direct;(*i*) and under the thirtieth section of the same act, the court is enabled, where it decrees specific performance of a contract concerning any lands, to declare that any of the parties to the action are trustees of the lands or any part of them.(*j*) It has been held under these sections that where the contract is merely executory, the court cannot, on petition only, declare the heir of the vendor a trustee for the purchaser,(*k*) but that it can do so where, during the vendor's life, the contract has been executed by payment of the purchase-money and the execution of a formal covenant to surrender.(*l*)

§ **192**. Where the vendor leaves a widow, who, but for the contract, would be entitled to freebench, the contract may be enforced against her, and she must be a party;(*m*) and the same practice must be pursued in cases of dower of widows married since the 1st of January, 1834.(*n*)[1]

§ **193**. Where a binding contract has been made by a vendor who subsequently dies, it would seem that, if the executors decline to enforce the performance, or to compel

(*g*) Harris v Ingledew, 3 P Wms., 91; Cotton v. Wilson, id., 190; Wakeman v. Countess of Rutland, 3 Ves., 233; Morrison v Arnold, 19 id., 670; Beales v. Lord Rokeby, 2 Mad., 227.
(*h*) Bullock v. Bullock, 1 J. & W., 603.
(*i*) Re Howard, 5 De G. & Sm., 435.
(*j*) As to the costs of the infant heir, see Barker v. Venables, 13 W R, 803.
(*k*) Re Carpenter, Kay, 418.
(*l*) Re Cuming, L. R. 5 Ch., 72.
(*m*) Hinton v Hinton, 2 Ves. Sen, 631, 638; Brown v. Raindle, 3 Ves., 256.
(*n*) 3 and 4 Wm IV, ch. 105.

[1] The case of Johnson v. Legard, here cited, does not seem thoroughly to establish this exception. The case came before the lord chancellor, on appeal, and judgment affirmed. The creditors of a vendor had filed a bill against the executors and heir of the vendor and the purchaser for specific performance. Limitations in a marriage settlement of the property in question to the brothers of the settler and their issue were held to be merely voluntary; but, under the circumstances of the case, it was decided that a purchaser could not be compelled to take the estate depending on the validity of those limitations. On the ground, therefore, that a good title could not be furnished, the bill was dismissed; but not, however, as has been inferred, solely for that reason; but also because the agreement for purchase was suspicious, "*and it being doubtful whether the creditors could file such a bill.*"

the purchaser to do so, an action may be brought for the purpose of executing the contract by the creditors of the deceased vendor against the executors and heir of the vendor and the purchaser.(*o*)[1]

§ **194**. In a case(*p*) where executors of a vendor of leaseholds to a railway company filed their bill for specific performance, alleging (truly) that they had not proved the will, but before the hearing of an interlocutory motion to restrain the company from continuing in possession, the probate had been obtained, it was held that the defendants could not resist the motion on the ground of the bill being demurrable.

§ **195**. If the purchaser die before completion, the contract may be enforced either by or against the vendor or the heir or devisee of the purchaser; the personal representative being a party as having an interest in disputing the contract, and as being the hand to pay the purchase-money;(*q*) and the heir or devisee of the purchaser being a party as being the person entitled to have the estate conveyed to him, and to insist on a proper inquiry into the title.(*r*)[2]

§ **196**. The heir or devisee has no right to insist on the completion of a purchase, except where the contract is such as might have been enforced against his ancestor or testator; for otherwise he would be able to take the purchase-money from the personal estate, in order to purchase for himself

(*o*) See Johnson v. Legard, T. & R., 281; 1 Mad. Ch., 369.
(*p*) Newton v. Metropolitan Railway Co., 1 Dr. & Sm., 583.
(*q*) Buckmaster v. Harrop, 7 Ves., 341; S. C., 13 id., 456, where the residuary legatees were made parties; and see Holt v. Holt, 2 Vern., 322; Brafield v. Scriven, 22 W. R., 202 (decree against executor with costs).
(*r*) Townsend v. Champernowne, 9 Pri., 130.

[1] This is undoubtedly the rule (Champion v. Brown, 6 John. Ch., 398), except where the agreement is for a purchase out of the personal estate. In this case the agreement must have been binding upon the parties contracting, so that the property was converted, in equity, before death. 2 Story's Eq. Jur., § 790. Buckmaster v. Harrop, 7 Ves., 341; Broome v. Monck, 10 id., 597. This proceeds on the principle that, in equity, money agreed to be laid out in land, is considered as land, and land agreed to be turned into money, as money. Stevenson v. Tandle, 3 Hayw., 109; 2 Story's Eq. Jur., §§ 790, 791, 1212.

[2] Townsend v. Champernowne, 9 Price, 130; Lord v. Underdunk, 1 Sandf. Ch., 46; Miller v. Henderson, 10 N. J. Eq., 320. As to making heirs of deceased partner parties, see Knott v. Stephens, 3 Oregon, 269. That the heirs, and not the administrator, should file a bill, see House v. Dexter, 9 Mich., 246; Webster v. Tibbitts, 19 Wis., 438. As to making the executors or administrators of a deceased vendee parties, Coke v. Evans, 9 Yerg., 289; Peters v. Jones, 35 Iowa, 512; 1 Danl's Ch. Pr. (4th amend. ed.), 285; Harding v. Handy, 11 Wheat., 104; Downing v. Risley, 15 N. J. Eq., 93; Ashertz's App., 34 Pa St., 375; Jackson v. McCoy, 56 Miss., 78.

that which his ancestor was not bound to purchase, and perhaps never would have purchased.(*s*)

§ **197**. In a case where, after a suit had been instituted by a vendor against a purchaser, and a reference of title and report in favor of it had been made, the purchaser died, the court, on the application of his real and personal representatives, ordered the plaintiff to revive, or, in default thereof, that his bill should stand dismissed.(*t*)

§ **198**. Where a person who has agreed to take a lease dies, the executors admitting assets may be compelled to take a lease, the covenants being so qualified as that the executors shall be no further liable thereon than they would have been on the covenants which ought to have been entered into by their testator.(*u*)

§ **199**. The maxim *actio personalis moritur cum personâ* has no reference to legal proceedings arising from contract. But an exception to the devolution of the liability to perform contracts by the death of one of the parties, arises in all cases in which the personal skill or taste of one of the contracting parties is required; for in such cases the death of that party discharges the contract, and exempts his personal representatives from liability for the breach of contract occasioned by non-performance after his decease(*v*)—an exception obviously grounded on the same principle as the non-assignability of such contracts, hereafter considered.(*w*) On this principle it has been decided that, if an author contract to complete a work, and die before doing so, his executors will be dischargnd from the contract; (*x*) or, if a master contract to teach an apprentice, and die before the expiration of the term, his representatives will be equally excused.(*y*) And in one case a contract to build a lighthouse was, from the skill and science involved in its performance, held to be a personal contract.(*z*) This principle would, of course, apply as much in actions for specific performance as in actions for damages.

(*s*) Broome v. Monck, 10 Ves., 597; Buckmaster v. Harrop, 13 Id., 471, 472; Savage v. Carroll, 1 Ball & B., 265, 281; Garnett v. Acton, 28 Beav., 333; Collier v. Jenkins, You., 295. Consider Ingle v. Richards (No. 1), 28 Beav., 361, 364.

(*t*) Norton v White, 2 De G. M. & G., 678.

(*u*) Phillips v. Everard, 5 Sim., 102; Stephens v. Hotham, 1 K. & J., 571. See, also, Page v. Broom, 3 Beav., 36. Distinguish Blosse v. Prendergast (13 Ir. Ch. R., 373), where the lease had been executed by the lessor, but not by the lessee, before the latter's death.

(*v*) Per Lord Wensleydale in Siboni v. Kinkman, 1 M. & W., 423.

(*w*) See Infra, § 203.

(*x*) Marshall v. Broadhurst, 1 Tyrw., 349; S. C., 1 Crompt. & Jer., 405

(*y*) Baxter v. Burfield, 2 Str., 1266.

(*z*) Per Patteson, J., in Wentworth v. Cock, 10 A. & E., 45.

CHAPTER IV.

OF AN ASSIGNMENT OF THE CONTRACT OR OF THE PROPERTY.

§ 200. As a general rule, the benefit of a contract may be assigned in equity, and the assign can enforce specific performance of it, making his assignor a party.(*a*)[1] Thus,

(*a*) Of course, if a new contract has been come to between the assignee and the person who originally contracted with the assignor, the assignor is not a necessary party to an action brought on the new contract.

[1] Where a contract has been assigned, the assignee cannot be compelled to perform; there is no contract between the vendor and the assignee. It makes no difference that payments have been made by the assignee. The vendor must enforce the agreement against the original vendee. Corbus v. Tweed, 69 Ill., 205. In Hanna v. Wilson, 3 Dratt., 293, it was held that the assignee might maintain an action for specific performance against the vendor, provided the assignor was made a party. Where the assignment is absolute, and the assignor has no equitable interest, he need not be made a party. Bruce v. Harrington, 2 Atk., 238; Trecothick v. Austin, 4 Mason, 41; Whitney v. McKinney, 7 John. Ch., 144; Miller v. Bear, 3 Paige's Ch., 467; Colenick v. Hooper, 3 Ind., 316; Miller v. Whittier, 32 Me., 203; Currier v. Howard, 14 Gray, 511. The assignee of one of several obligees, in a bond for the conveyance of real property, commenced an action and subsequently acquired the interest of all the obligees in the bond. Such action was no bar to a subsequent action for specific performance, where the same parties were interested concerning the same property. Knott v. Stevens, 3 Oregon, 235. Where the original parties to a contract would be entitled to a decree of specific performance, all parties who claim under them have their rights, always provided that no equities intervene. Hays v. Hall, 4 Porter, 374; McMorris v. Crawford, 15 Ala., 271; Ewins v. Gordon, 49 N. H., 444. A. sold land to B., and reserved a right of way. B. executed a bond to A., agreeing to make the passage-way on demand, after a given time. The land was afterwards sold to C., subject to the reservation. B. and C. were requested to make the passage-way, and neglected to do so. Held, that the bond was a personal obligation, and that B., having sold the land, could not be compelled to specifically perform. Smith v. Kelley, 56 Me., 64. A lease was assigned, which had in it a covenant for renewal. Held, that the assignee could maintain an action for renewal, as against the covenantor. Robinson v. Perry, 21 Ga., 183. The assignee of a chattel received the legal title, subsequent to the making of a contract respecting the same property, which did not pass the legal nor the equitable title. Held, that a court of equity will not decree specific performance against the assignee, notwithstanding he acquired with notice. Maulden v. Armistead, 18 Ala., 500. As to the power of an assignee of a chose in action to sue at law in Massachusetts, see Walker v. Brooks, 125 Mass., 241.

Who should join in action?] Where a contract has been assigned, all the assignees, through whose hands it has passed, should be joined in an action for specific performance. Estill v. Clay, 2 A. K. Marsh., 497. Allison v. Shilling, 27 Tex., 450.

Assignee in bankruptcy, when a party.] The vendor of land executed a bond for title, but did not receive the whole of the purchase money, and afterwards became bankrupt. Held, that his assignee in bankruptcy was a proper party

for example, where there was a contract for a lease, which contained nothing to show that it was made with the assignor (who had become insolvent) from any personal motive, and the assign was solvent, the contract was enforced in favor of the assign.(*b*)[1] Similarly, where there is

(*b*) Crosbie v. Tooke, 1 My. & K., 431; Morgan v. Rhodes, id.. 435 But see Dowell v. Dew, 1 Y. & C. C. C , 345, where Knight Bruce, V. C., refused to grant specific performance of a contract for a lease to an assignee, except upon the terms of the assignor entering into the covenants of the lease This decision was affirmed by Lord Lyndhurst, 12 L. J. Ch., 153. See infra, § 205.

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defendant, and must be so made in an action for specific performance of the contract to convey. Lampson v. Rouse, 65 N. C., 34.

Where property is sold under a decree.] Where property is sold under a valid decree, the purchaser of a vendor's title stands in his shoes, and may maintain an action for specific performance against the vendor. He may file a bill to sell the premises in default of payment, and may discharge himself from the vendee's equities. The vendee, however, has no right to a decree of sale against the vendor for the purpose of paying the unpaid purchase money. Fitzhugh v. Smith, 62 Ill., 486 After execution against the vendee, see Tomlinson v. Blackburn, 2 Ired. Eq., 509.

Assignee's liability with notice; rule.] A party having entered into an agreement for the sale of property, and afterwards assigns the same, or contracts to do so to a person having notice of the original contract. Held, that the assignee would be liable to perform it at the suit of the purchaser. All parties claiming any interest in the land, obtained after the date of the contract sought to be specifically enforced with notice, are necessary parties to the action to compel conveyance. Hersey v. Gillett, 18 Beav., 174; Foss v. Haynes, 31 Me., 81; Lanerty v. Moore, 33 N. Y., 658; New Barbadoes Bridge Co. v. Vreeland, 4 N. J. Eq. (3 Green), 157; Morris v. Hoyt, 11 Mich., 9; Seager v Burns, 4 Minn., 141; Stone v. Buckner, 12 Smed. & Marsh, 73; Scarborough v. Arrant, 25 Texas, 129; Fullerton v. McCurdy, 4 Lans. (N. Y.), 132. Notice to an agent is notice to the principal. Bryant v. Booze, 55 Ga., 438. As to liability with notice, see Bird v. Hall, 30 Mich., 374.

Deed held as escrow.] A. held a deed as an escrow, and refused to deliver it. Held, that he was a proper party in an act for specific performance of the instrument. Davis v. Henry, 4 W. Va., 571.

Equitable title; action by holder.] The holder of an equitable interest in land contracted to convey an interest in the same subject to the approval of the owner, but with his knowledge. The purchaser, at great expense, improved the value of the property. Held, that the contract would be enforced, subject to the rights of the holder of the legal title for a sum due him. Booders v. Murphy, 78 Ill., 81.

[1] A., being the owner of a tract of land supposed to contain minerals, on the 21st of January, 1839, by a written instrument granted liberty to B. to dig a mine on such land, and to carry away any mineral which he might dig thereon within one year; and B., on the 11th of May, 1839, by a writing signed by him on the back of such instrument, assigned to C. all his interest, right and privilege in the land therein mentioned, with the appurtenances, and all the benefit and advantages derivable from such instrument; after which B. brought a bill in chancery against A. for specific performance of the agreement. Held, 1st, that the agreement was not of a fiduciary character, or in the nature of a personal confidence, so as to be incapable of assignment; nor, 2d, was the interest of B. of that uncertain and contingent kind, that it could not on that account be transferred; and consequently that B. having parted with all his interest in the subject of the bill, it ought for that reason to be dismissed. Gaston v. Plum, 14 Conn., 344. The captain of a steamboat, as such, entered into a contract for carrying the mails on board the boat, and afterwards, freely and fairly, assigned it to the owners of the boat, by an instrument under his hand

nothing personal in the contract or the motives to it, a person who has appeared as agent may afterwards disclose himself as a principal, and enforce the contract in his own name (*c*) And where A. contracted for an estate from B., A. having previously agreed with C. to sell the estate to him, and B. resisted performance on this amongst other grounds; the price being adequate, and B. not suggesting that he had ever refused, or was unwilling, or would have objected to treat with C., or might have obtained better terms from him, had he known the real circumstances of the case, specific performance was granted at the suit of A. and C.(*d*)

§ 201. An assign of a contract by way of mortgage may enforce his security by means of specific performance. Thus, in a case decided by Lord Hatherley (then Wood, V. C.), where A. had agreed to sell certain property to B., and then had mortgaged his interest under this contract to

(*c*) Fellowes v. Lord Gwydyr, 1 R. & My., 83.

(*d*) Nelthorpe v. Holgate, 1 Coll., 203.

and seal. Held, that the assignment was valid, and that the captain was estopped from denying that the contract was assignable. Roorback v. North River Steamboat Co., 6 John. Ch., 469 The purchaser at a master's sale may assign his bid before the execution of the master's deed; and on application by the assignee, the court will direct a conveyance immediately to him. Proctor v. Farnan, 5 Paige, 614. In New York, any estate in personal property, and a mere possibility when coupled with an interest in real estate, has always been assignable. Lawrence v. Bayard, 7 Paige, 70. So may an assignee of an assignee of a copartner in a joint purchase and sale of lands, sustain a bill in equity against the other copartners; and the agent of the partnership to compel a discovery of the quantity purchased and sold, and for an account and distribution of the proceeds. Pendleton v. Hambersie, 4 Cranch, 73. In McKee v. Hoover, 1 Monroe, 32, it is held that a contract by one person to serve another for a certain length of time, imposes on him an obligation of servitude, and such contract may be assigned so as to transfer the term. But perhaps the case is somewhat at variance with other opinions. See Davenport v. Gentry, 9 B. Monr., 427. The right to reclaim usury is assignable in equity. Breckenridge v. Churchill, 3 J. J. Marsh., 11. The claim to a legacy is strictly an equitable claim, and the whole interest therein may be passed by the legatee by an assignment. King v. Berry, 2 Green's Ch., 44. Entries of land are assignable in Kentucky; but not in Virginia, though warrants and surveys may be so passed. Hart v. Benton, 4 Bibb, 420, and 3 id., 534. In Alabama, a widow may assign her interest in her husband's estate, and such assignment is sufficient, in equity, to pass such interest to the assignees. Powell v. Powell, 10 Ala, 900. An order drawn by a legatee for value, on the executor for the amount of his legacy, payable out of the fund provided by the testator for that purpose, is an equitable assignment of the legacy. Anderson v. De Soer, 6 Gratt., 363. And in Nimmo v. Davis, 7 Texas, 26, it is said that all contingent and executory interests may be assigned in equity, and will be enforced if made for a valuable consideration; and all contingent estates of inheritance as well as springing and executory uses and possibilities, coupled with an interest, if the person to take is certain, are transmissible by descent, devisable and assignable. But it has been said that a contract is only assignable when the entire interest therein can pass by the assignment, both legal and equitable. White v. Buck, 7 B. Monr., 546.

C., and C. had assigned his mortgage to D., it was held that D. (submortgagee) might maintain a bill against the purchaser B. for the performance of the original contract between him A.(*e*)

§ **202**. The assignability of contracts in equity is, however, subject to some exceptions and limitations, which, for the most part, fall under one or other of the following classes, viz.: (1) where the contract is personal; (2) where the contract contains a provision against assignment; and (3) where the assignment is illegal or contrary to public policy.

§ **203**. (1) It is an obvious principle, that where the learning, skill, solvency, or any personal quality of one of the parties to the contract is a material ingredient in it, then the contract can be performed by him alone. It may be a matter of indifference to A. whether B. or C. be the purchaser of the stock or paid-up shares he is selling; but it is a matter of great moment whether a distinguished artist, or his nominee, paint a picture for which A. may have agreed to pay a certain sum. Accordingly, in the case of contracts of the latter kind, it is not competent to a person, who has appeared as agent for a principal on whose personal qualities reliance has been placed, to show himself to be the principal and to sue in his own name;(*f*) in respect of such contracts bankruptcy confers no claim on the trustee;(*g*) and the benefit of such contracts is incapable of being assigned.(*h*)

§ **204**. Thus, where a contract established a personal relation between an author and his publisher, it was held that it was incapable of assignment.(*i*) So where a coachbuilder contracted with A. to supply him with a chariot for five years, and within that period the coachbuilder assigned the contract to a third person, it was held that A. had a right to have the benefit of the judgment and taste of the coachbuilder to the end of the term, and consequently that an action brought by the coachbuilder and his assign against

(*e*) Browne v. London Necropolis Co., 6 W. R., 188. In this case, however, specific performance was, on another ground, refused.

(*f*) Per Alderson, B., in Rayner v. Grote, 15 M. & W., 365. See supra, § 199.

(*g*) Per Lord Abinger, C. B., in Gibson v. Carruthers, 8 M. & W., 343. Cf. Drake v. Mayor of Exeter, 1 Eq. Cas. Abr., 53 (and the notes to Hovenden's edition of Freeman, vol. 2, p. 153); also Vandenanker v. Desbrough, 2 Vern., 96; Moyses v. Little, id., 194.

(*h*) Distinguish Jalabert v. Duke of Chandos, 1 Eden, 372 (keepership of walks).

(*i*) Stevens v. Benning, 1 K. & J., 168.

A. could not be maintained.(*j*) So, also, where a lessee in insolvent circumstances suffered another person to become the apparent owner of the farm, but with a secret trust for himself, and the landlord, supposing the trustee to be the rightful owner, and trusting to his solvency, entered into a contract with him to grant him a new lease—in a suit by the original lessee against the landlord, specific performance of this contract was refused, the court considering that the landlord had entered into it expecting to have the covenants of a man of substance, which he could not do, as there would be no equity to compel the trustee to enter into the covenants.(*k*) And so again, if a landlord trusts to the skill of a person who is in fact a secret trustee, he will not be obliged to execute the contract for the *cestui que trust*.(*l*)

§ **205**. How far, in the case of an ordinary contract for a lease, the intended lessor relies on the solvency of the intended lessee as a personal qualification, is a point on which somewhat different views have been taken.(*m*)[1] But it appears to be now clear from the judgments of Lord Lyndhurst and Lord Chelmsford that such contracts are assignable and may be enforced by the assign.(*n*)

§ **206**. Again, it is presumably clear that if A. owed B. £1,000 and B. then agreed to buy from A. an estate for £2,000, no assign of A. could sue B. for performance except upon the terms of giving B. the benefit of the set-off of £1,000.(*o*)

§ **207**. Again, where, though the relation established by the contract may have in it nothing personal, some previous personal relation of favor, or otherwise, between the con-

(*j*) Robson v. Drummond, 2 B. & Ad., 303.
(*k*) O'Herlihy v. Hedges, 1 Sch. & Lef., 125.
(*l*) S. C.; per Grant, M. R., in Featherstonaugh v. Fenwick, 17 Ves., 313.
(*m*) Crosbie v. Tooke, Morgan v. Rhodes, Dowell v. Dew, supra, § 200; Buckland v. Papillon, L. R. 1 Eq., 477, 2 Ch., 67. See, also, Stocker v. Dean, 16 Beav., 161, where, from the personal nature of acts to be done, a right of pre-emption was held to be limited to the life of the person who had to do them.
(*n*) 12 L. J. Ch., 164; id., 2 Ch., 71.
(*o*) Boulton v. Jones, 2 H. & N., 564.

[1] In Illinois, a note payable in mason work is not assignable, so as to enable the assignee to maintain an action thereon in his own name. Ransom v. Jones, 1 Scam., 291. So where a person received the use and occupancy of a farm, during his parents' lives, from a town, with a promise to give a deed upon their decease, upon condition that he would support his father, mother and idiotic brother, the contract was held not to be assignable. Clinton v. Fly, 1 Fairf., 292. A parol license to be exercised upon the land of another, is a mere personal trust and confidence, and as such, cannot be assigned, although it may be binding as between the parties, it will not pass to the purchaser. Cowles v. Kidder, 4 Foster (N. H.), 394.

tracting parties has been a material motive to the contract, it can be enforced by that person only, and not by a concealed *cestui que trust* or principal or assign. This is illustrated by the case of Phillips v. Duke of Buckingham ;(*p*) a negotiation had been entered into between the plaintiff and the duke for the purchase of an estate by the plaintiff, which had gone off; the plaintiff then got the secretary of Lord Chancellor Nottingham to enter into a negotiation on his behalf, but pretending it to be for the lord chancellor, or his son the solicitor-general; the duke had several cases depending in chancery, and, wishing to oblige the lord chancellor, entered into articles; but on discovering who was the real purchaser, refused to complete; according to the report in Vernon, the plaintiff's bill was dismissed, and the case is considered an authority for the principle established by such dismissal; for, though it appears that specific performance was ultimately granted, it seems to have been only on payment by the plaintiff of the full value of the estate, being a sum greater than that originally agreed on.(*q*) Lord Thurlow showed an inclination to disregard these personal motives, considering it to be immaterial in a contract for an annuity, that the defendant was in fact a trustee for the son of the plaintiff, with whom he had refused to deal.(*r*) But Lord Eldon expressed dissatisfaction with that decision ;(*s*) and the law seems now to be that where one person is deceived as to the real party with whom he is contracting, and that deception either induces the contract or renders its terms more beneficial to the deceiving party, or more onerous to the deceived, or where it occasions any other loss or inconvenience to the deceived party, there the contract cannot be enforced against him; but that where none of these circumstances can be shown to follow from the deception, the contract may be enforced.(*t*)

§ **208**. "Does error in regard to the person with whom I contract," asks Pothier,(*u*) "destroy the consent and annul the contract? I think that this question ought to be decided

(*p*) 1 Vern., 227. See, also, Harding v. Cox, id., n.

(*q*) See Raithby's note (quoting the Reg. Lib.) at p. 229 of vol. 1 of his edition of Vernon. And see the case in Vernon, 1 St. Leon. Vend., 349, n (10th ed.). See, also, Scott v. Langstaffe, cited Lofft., 797.

(*r*) Lord Irnham v. Child, 1 Bro. C. C., 92. See, also, Jordan v. Sawkins, 1 Ves. Jun., 402.

(*s*) Bonnet v. Sadler, 14 Ves., 528.

(*t*) Fellowes v. Gwydyr, 1 Sim., 63; 1 R. & My., 83.

(*u*) Traite des Obligations, § 19. See Smith v. Wheatcroft, L. R. 9 Ch. D., 223.

by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent, and consequently annuls the contract. * * * On the contrary where the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whomsoever as with him with whom I thought I was contracting, the contract ought to stand."

§ **209**. The same principle, of course, applies to assignments. So where a contract for a lease was entered into by a lady with her son-in-law for his personal accommodation in the mansion house and demesne lands, in the nature of a family transaction, the court refused specific performance at the suit of his assignees in bankruptcy.(*v*)

§ **210**. (2) Where the contract stipulates that the instrument to be executed in performance of it shall contain a proviso against assignment, this operates to prevent, not only an assignment of the interest when perfected, but also of the contract to grant it.(*w*) But the benefit of the proviso may, of course, be waived for the purposes of specific performance; as where the assign of the intended lessee was recognized by the intended lessor as tenant.(*x*)

§ **211**. (3) The statute, 32 Henry VIII, ch. 9, which is entitled the bill of bracery and buying of titles, prohibits any person from selling or buying any pretended rights or titles to any lands, except the vendor has been in possession of the same, or of the reversion, or in receipt of the rents thereof, for a year before the sale; but it provides that it shall be lawful for the person in possession to buy in any pretended title. In Sharp v. Carter,(*y*) and Hitchens v. Landor,(*z*) pleas founded on this statute were allowed. In a case (*a*) before the court of common pleas, A. the owner of a term died in 1828, and B. his brother, who had previously been in possession of part of the premises, then took possession of the whole, and continued so until 1829, when

(*v*) Flood v. Finlay, 2 Ball & B., 9.
(*w*) Weatherall v. Geering, 12 Ves., 504; cf. Jalabert v. Duke of Chandos, 1 Eden, 372.
(*x*) Dowell v. Dew, 1 Y. & C. C. C., 345; 12 L. J. Ch., 158.
(*y*) 3 P. Wms., 375.
(*z*) G. Coop., 34. See, also, Wall v. Stubbs, 1 Mad., 80; S. C., 2 V. & B., 354.
(*a*) Doe d. Williams v. Evans, 1 C. B., 717. See, also, per Montague, C. J., in Partridge v. Strange, Plowd., 88.

he died, leaving all his interest in the property to C., who thereupon entered and remained in undisputed possession until 1841, when D., a brother of A., the original termor, took out administration to him, and sold his interest in the property, as such administrator, for £10, the transaction was held to be void both by the common law and under the statute. Wherever a contract gives rise to a pretended right or title to any lands and to nothing more, the assignment of such a contract would be within the statute.

§ **212**. But a transfer of an expectancy is not within the mischief of the statute; for the sale of an expectancy is not an allegation of any present right or title, but of the possibility of one thereafter to exist.(*b*)

§ **213**. The principle on which the statute of Henry VIII. is founded, and which gives rise to the doctrines of champerty and maintenance, namely, that persons ought not to be allowed to come in for the mere purpose of litigating rights which others are not disposed to enforce, applies to render void some cases of assignment which are not strictly within the above statute. Thus, whilst it is clearly lawful to assign a right at the time undisputed, and if, from circumstances afterwards discovered, a necessity arises for litigation against third parties, the assign may maintain his action;(*c*) yet it is as clearly against public policy to allow of the assignment of a mere naked right to bring an action for a matter in dispute.(*d*) On this ground the Irish court of chancery refused its assistance to enforce the performance of a contract by a person out of possession, to grant a present lease to a person who was at the time apprised that he could not obtain possession, except by a suit.(*e*)[1] "I do not hesitate to say," said Turner, L. J.,(*f*) "that, in my opinion, the right to complain of a fraud is not a marketable commodity, and that if it appears that an agreement for purchase has been entered into for the purpose of acquiring

(*b*) Cook v. Field, 15 Q. B., 460.
(*c*) Wilson v. Short, 6 Ha., 366.
(*d*) Prosser v. Edmonds, 1 Y. & C. Ex., 481. With the distinction between this and the preceding case, compare the distinction between furnishing evidence for the recovery of property without a view to litigation, and furnishing evidence to maintain litigation (Spryc v Porter, 7 El. & Bl., 58), and note that the statement in the text does not apply to a trustee in bankruptcy. Scear v. Lawson, 15 Ch. D., 426.
(*e*) Bayly v. Tyrrell, 2 Ball & B., 358. In this case the lease to the plaintiff had been actually executed.
(*f*) In De Hoghton v. Money, L. R. 2 Ch., 169; affirming S. C., L. R. 1 Eq., 154.

[1] See Marshall v. Means, 12 Geo., 61.

such a right, the purchaser cannot call upon this court to enforce specific performance of the agreement. Such a transaction, if not in strictness amounting to maintenance, savors of it too much for this court to give its aid to enforce the agreement."

§ **214**. Upon principles of public policy contracts by which railway or public companies seek to devolve business, or delegate powers, with which they are entrusted, on persons to whom the legislature has not entrusted them, and on whom it has not attached the same responsibilities that it has on the companies, are incapable of being enforced by a court of equity.(*g*)[1]

(*g*) Johnson v. Shrewsbury and Birmingham Railway Co., 3 De G. M. & G., 914; Beman v Rufford, 1 Sim. (N. S.), 550; S. C., 7 Rail. C., 48; Great Northern Railway Co. v. Eastern Counties Railway Co., 9 Ha., 306; Winch v. Birkenhead, Lancashire and Cheshire Junction Railway Co., 5 De G. & Sm., 562; London, Brighton and South Coast Railway Co. v. London and South Western Railway Co., 4 De G. & J., 362.

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[1] Among those cases in which assignments will not be upheld either in equity or at law, as being against the principles of public policy, is the assignment of the commission of an officer in the army by way of mortgage. Collyer v. Falcore, 1 Turn. & Russ., 459. Neither is the full pay or half pay of an army or navy officer assignable, either by the party or by operation of law. Daves v. Duke of Marlborough, 1 Swanst. R., 79; McCarty v. Goold, 1 Ball & Beat., 387; Stone v. Littledale, 2 Anst. R., 533. But the claims of officers of the revolution for compensation for services, as promised by Virginia unpaid at the death of the officer, are assets, and assignable as other choses in action. Merriwether v. Herran, 8 B. Monr., 162. "The same doctrine has been applied to the compensation granted to a public officer for the reduction of his emoluments, or the abolition of his office, who, by the terms of his grant, might be required to return to the public service. For in such a case the object of the government is to command a right to his future services, and to enable the party to perform the duties, with suitable means to support him." Wells v. Foster, 8 M. & W., 149. In like manner the profits of a public office would seem, upon a similar ground of public policy, not to be assignable. Hill v. Paul, 8 Clark & Fin., 295; Palmer v. Bate, 2 Bro. & Bing., 673. In reference to pensions which are held to be assignable, see Story's Eq. Jur., § 1040. The salary of the assistant parliamentary counsel for the treasury has been held not to be assignable. Cooper v. Reilly, 2 Sim. R., 560. But the grounds upon which the decision rested are the subjects of considerable doubt, and it is a much mooted question "whether a compensation or pension granted during pleasure, and not for any certain time, and revocable in its own nature, is properly the subject of an assignment, as being of too uncertain and fleeting a character to pass by assignment—for although mere expectancies may pass by assignment, yet they must be of a substantial character, and not ordinarily of such a nature as to rest in the pure discretion of the party granting or withholding them, from time to time, at his pleasure." Story's Eq. Jur., § 1040 f, and note. A distinction has also been taken between the case of an assignment of the arrearages of full pay, or half pay, or other compensation connected with the right to future success, and the case of an assignment of the future accruing pay, or half pay, or other compensation, as the right to arrearages has become absolute, and the assignment thereof may not interfere with any public policy. Story's Eq. Jur., § 1040 f. And military prize money, although resting in the mere bounty of the crown, is held to be different in its nature and objects from military pay, and treated as a right of property rather than as a personal pension or reward. Alexander v. Duke of Wellington, 2 Russ. &

§ **215**. It must be added that, even where a concluded contract would be assignable, the benefit of an offer cannot, it seems, be transferred by the person to whom it is made to a third person. "In case of an offer by A. to sell to B., an acceptance of the offer by C. can establish no contract with A., there being no privity."(*h*)

§ **216**. The assign of a contract may, as has been shown, sue on it;(*i*) but he cannot, by notice to the other party to the contract, deprive him of the right to complete it with the original contractor, or make him responsible for any loss which may result to the assign from the completion of the contract with his assignor.(*j*)

§ **217**. Questions may of course arise as to the extent of the contract to the benefit of which the assign is entitled. Thus, where a lease was agreed to be granted to A. of an hotel near a station, and it was further agreed that A. should have the occupation of the refreshment rooms, the question arose whether the assign of the lease granted to A. was entitled to sue for the occupation of the refreshment rooms. It was held in the affirmative.(*k*)

§ **218**. Where a contract has been entered into for the sale of property, and that property is afterwards aliened or assigned, or contracted to be aliened or assigned, and the alienee or assign has notice of the original contract, he is liable to its performance at the suit of the purchaser.[1] "If," said Lord St. Leonards,(*l*) "the contract is a binding one, it can be enforced against any party in whom is vested

(*h*) Meynell v. Surtees, 3 Sm. & Gif., 101, 117; Boulton v. Jones, 2 H. & N., 564.
(*i*) Cf. Birmingham Canal Co v. Cartwright, 11 Ch. D., 421 (covenant to give right of pre-emption).
(*j*) McCreight v. Foster, L. R. 5 Ch., 604; affirmed *s. n.* Shaw v. Foster, L. R. 5 H. L., 321; Crabtree v. Poole, id. 12 Eq., 13.
(*k*) Flanagan v. Great Western Railway Co., L. R. 7 Eq., 116.
(*l*) In Saunders v. Cramer, 3 Dr. & War., 99.

Mylne, 35; Stephens v. Bagwell, 15 Ves., 139. It may be laid down as a general rule, that, where an equitable interest is assigned, in order to give the assignee a *locus standi in judicio* in a court of equity, the party assigning such a right must have either a substantial possession, or some capability of personal enjoyment in the thing assigned. Prosser v. Edwards, 1 Younge & Col., 481.

[1] Langdon v. Woolfolk, 2 B. Mon., 105; Castle v. Wilkinson, L. R., 5 Ch., 536; Caldwell v. Carrington, 9 Pet., 86; Hoagland v Latourett, 1 Green Ch., 254; Glover v. Fisher, 11 Ill., 666; Wright v. Dame, 22 Pick., 55; Clark v. Flint, 22 id., 321; Baldwin v. Lowe, 22 Iowa, 367; Snowman v. Hareford, 57 Me., 397; Walker v. Cox, 25 Ind., 257; Patten v. Moore, 32 N. H., 382, Fullerton v. McCurdy, 4 Lans., 132; Stone v. Buckner, 12 Lon. & Marsh., 73; Morris v. Hoyt, 11 Mich., 9; see Davis v. Henry, 4 W. Va., 571; Powell v. Young, 45 Md., 414.

the legal and beneficial interest in the property." "If," said Lord Rosslyn,(*m*) "he is purchaser with notice, he is liable to the same equity, stands in his place, and is bound to do that which the person he represents would be bound to do by the decree." This principle has been acted on in numerous cases.(*n*)

§ **219**. In particular the principle applies to unregistered contracts relating to land in register counties. Such contracts may be enforced against subsequent purchasers who may have obtained conveyances which they have registered, if they have notice of such prior contracts.(*o*)

§ **220**. Where a person having a prior title gets in the subsequent estate which is affected by the contract, and has notice, he cannot protect himself from the performance of the contract by his elder title; thus, where an equitable mortgagor entered into a contract for a lease, and then the mortgagee, whose mortgage was prior to the contract, bought the estate with notice, he was held bound to specifically perform the contract;(*p*) and again where A., having only the equity of redemption, agreed to sell to B., and subsequently both A. and his mortgagee conveyed to C., who had notice of A.'s contract with B., it was held that B. might enforce specific performance against C.(*q*)[1]

(*m*) In Taylor v. Stibbert, 2 Ves. Jun., 437.
(*n*) Jackson's Case, 5 Vin. Abr., 543, pl. 3; Howard v. Hopkins, 2 Atk., 371; Ford v. Compton, 2 Bro. C. C., 32, and Belt's n., 2; Jalabert v. Duke of Chandos, 1 Eden, 372; Brooke v. Hewitt, 3 Ves., 253; Knollys v. Alcock, 5 id., 648; Meux v. Maltby, 2 Sw., 277; Spence v. Hogg (before Shadwell, V. C., and Lord Cottenham), 1 Coll., 225; Dowell v. Dew, 1 Y. & C. C. C., 345; affirmed 12 L. J. Ch., 158; Crofton v. Ormsby, 2 Sch. & Lef., 583; Potter v. Sanders, 6 Ha., 1; Hersey v. Giblett, 18 Beav., 174; Shaw v. Thackray, 1 Sm. & G., 537; Goodwin v. Fielding, 4 De G. M. & G., 90; Waldron v. Jacob, I. R. 5 Eq. 131; Reilly v. Garnett, id. 7 Eq., 1, and supra, § 184. See, too, Dyas v. Cruise, 2 Jon. & L., 460 (where a contract for a lease was enforced against a provisional assignee in insolvency); and as to the last mentioned case, cf. infra, § 225.
(*o*) Per James, L. J., in Greaves v. Tofield, 14 Ch. D., 572.
(*p*) Smith v. Phillips, 1 Ke., 694; Mumford v. Stohwasser, L. R. 18 Eq., 556.
(*q*) Lightfoot v. Heron, 3 Y. & C. Ex., 586.

[1] "It is well settled," says Chancellor Kent, in Champion v. Brown, 6 John., 402, "that if A. enters into a contract to sell land to B., and afterwards refuses to perform his contract, and sells the land to C. for a valuable consideration, B. may, by bill, compel the purchaser to convey to him, provided he be chargeable in the notice, at the time of his purchase of B.'s equitable title under the agreement." And it was there further said, that the "rule that affects the purchaser is just as plain as that which would entitle the vendee to a specific performance against the vendor. If he be a purchaser, with notice, he is liable to the same equity, stands in his place, and is bound to do that which the person he represents would be bound to do by the decree. The purchaser from the vendor takes the estate subject to the charge, and so, I apprehend, does a purchaser from the vendee, and he is equally responsible in respect to the estate. The vendor cannot make him personally liable for the purchase money, but the estate is liable; and if he be a purchaser with notice, it is the same thing whether the estate had or had not been actually conveyed by the vendor." See

§ **221**. This principle of notice, under somewhat peculiar circumstances, was applied by Lord Eldon in the case of Mortlock v. Buller:(*r*) there the plaintiff alleged that a contract had been entered into by trustees of a marriage-settle-

(*r*) 10 Ves., 292, 315.

Murray & Winter v. Ballou & Hunt, 1 John. Ch., 566; Heatley v. Finster, 2 id., 158. Assignees take subject to all prior equities between the original parties. Scott v. Shreeve, 12 Wheat., 605; Bacon v. Warner, 1 Root, 349; Johnson v. Pryor, 5 Heyw., 243; Stockton v. Cook, 3 Munf., 68; Eslep v. Walkins, 1 Bland., 486; Mullikin v. Mullikin, id., 538; Gay v. Gay, 10 Paige, 369; Livingston v. Dean, 2 John. Ch., 479; King v. Lindsay, 3 Ired. Ch., 79; Porter v. Breckenridge, Hardin, 21. Thus, the assignee of trust property, with notice of the trust, takes it subject to the trust. Breedlove v. Stump, 3 Yerg., 257. And the assignee of a judgment takes it subject to all the equities existing against it in the hands of the plaintiff therein. Jordan v. Black, 2 Mur., 30. But equities, in order to be available against an assignee, must arise previously to the assignment, or, at least, before notice thereof. Ridgway v. Collins, 3 A. K. Marsh., 410. Therefore, equities arising between the maker and assignee of a note, after the assignment, cannot be enforced against the assignee. Daviess v. Newton, 5 J. J. Marsh., 89. It seems, however, that there is an exception to the doctrine of notice. "There is a peculiarity in the case of a dowress, which operates against her, and, upon this point of notice, is proper to be mentioned. Though notice of the title will protect every other interest in the inheritance, it will not protect her's." Story's Eq. Jur., § 410 (1). Therefore, a purchaser or mortgagor (who is a mortgagor *pro tanto*), though he has notice of a right of dower attaching upon the estate he is about to purchase, may advance his money, and, taking in a term, may avail himself of it, and thereby utterly defeat the right of dower. Wynn v. Williams, 5 Ves., 134; Mole v. Smith, Jacob's Rep., 497; Maundrell v. Maundrell, 10 Ves., 271; Swannock v. Lifford, Ambl. R., 6; Radner v. Vanderbendy, Show. Parl. Cas., 69. A purchaser without notice is not chargeable; and, therefore, though a purchaser at a public sale be chargeable with notice, yet a *bona fide* purchaser, under him, is not affected by his notice. Demarest v. Wynkoop, 3 John., 147; Wallwyn v. Lee, 9 Ves., 24 The rule is not, "however, absolutely universal; for it has been broken in upon in two classes of cases. In the first place, it is not allowed in favor of a judgment creditor who has no notice of the plaintiff's equity. This appears to proceed upon the principle that such judgment creditor shall be deemed entitled merely to the same rights that the debtor had, as he comes in under him, and not through him; and upon no new consideration, like a purchaser. Burgh v. Burgh, Rep. Tem. Finch, 28." Story's Eq. Jur., § 410 (1). It has been likewise said that a second exception has been formed in reference to dower, which is, that the rule does not apply in favor of a *bona fide* purchaser without notice against the claims of a doweress, as such. Williams v. Lambe, 3 Brown's Ch., 264. But this has been considered as an innovation without adequate foundation; and the propriety of the distinction has been much questioned. See Gerrard v. Saunders, 2 Ves., 454. Where A. purchased an estate, with notice of an incumbrance, and then sold it to B, who had no notice, and B. afterwards sold it to C., who had notice, it was held that the estate in the hands of C. was discharged of the incumbrance, notwithstanding the notice of A. and C. And this doctrine has ever since been adhered to, as an indispensable muniment of title. But if the estate becomes revested in the original party, the original equity will reattach to it in his hands. Story's Eq. Jur., § 410. In England, it is well settled that registration of conveyances does not amount to constructive notice to subsequent purchasers. Wyatt v. Barwell, 19 Ves., 435; Jolland v. Stambridge, 3 id., 477. But in America it is uniformly held, that such registration operates as constructive notice to all buyers of any estate, legal or equitable, in the same property. Parkhurst v. Alexander, 1 John. Ch., 394.

ment, who had a power to sell with the consent of the husband and wife; after the bill was filed, the wife died, and the husband's estate for life and remainder in fee were brought together, and the legal power of sale in the trustees was extinguished. But Lord Eldon said that if the purchaser had entered into the contract with the approbation of the husband and wife, as was required by the settlement, the contract bound the estate, and should be made good by those who took interests, if it could not out of the power.

§ **222**. This principle is not confined to executory contracts, but applies also to the specific relief given in respect of covenants and other executed contracts, for these may in all cases be enforced against any person into whose hands the property in question may come with notice.

§ **223**. Contracts to devise lands have been enforced against persons claiming them under the party contracting to make the will.(*s*)[1]

§ **224**. One particular species of assignment of a contract arises in the cases in which a railway or other public company has entered into a contract, and subsequently becomes amalgamated with some other company; for by this process the liability under the contracts of the existing companies

(*s*) Goylmer v. Paddiston, 2 Ventr., 353; S. C. as Goilmere v. Battison, 1 Vern., 48. And see further, as to contracts to make wills containing particular dispositions, Lord Walpole v. Lord Orford, 3 Ves., 402; Jones v. Martin, 5 id., 266, n.; Fortescue v. Hennah, 19 id., 67; Needham v. Kirkman, 3 B. & Al., 531; Needham v. Smith, 4 Russ., 318; Logan v. Wienholt, 1 Cl. & Fin., 611; Jones v. How, 7 Ha., 267; S. C., 9 C. B., 1; Barkworth v. Young, 4 Drew., 1; Eyre v. Monro, 26 L. J. Ch., 757; 5 W. R., 870; Aldersan v. Maddison, 5 Ex. D., 293.

[1] *Agreement to devise property by will.*] A court of equity will enforce an agreement binding a person to dispose of his property by will: and the heir at law will be compelled to convey the property according to the terms of the agreement. Such contract is regarded with suspicion, and will not be sustained except upon the strongest evidence that it was founded upon a valuable consideration, and was the deliberate act of the decedent. Logan v. Weirholt, 7 Bligh (N. S.), 1; Rives v. Rives, 3 Dessau.'s Eq., 195; Izard v. Izard, 3 id., 116, note; McClure v. McClure, 1 Pa. Stat., 378; Brinker v. Brinker, 1 id., 53; Logan v. McGinnis, 12 id., 32; Mundseph v. Kilbourn, 4 Md., 459; Wright v. Tinsley, 30 Mo., 389; Gupton v. Gupton, 47 id., 37; Sutton v. Haydon, 62 id., 101; Johnson v. Hubbell, 10 N. J. Eq. (2 Stock.), 332; Finsly v. Parkhurst, 29 Md., 58; Harder v. Harder, 2 Sandf. Ch., 17; Carsligle v. Flemmings, 1 Harring., 421. In Stafford v. Bartholomew, 2 Carter, 153, a contrary rule is held. See as to the power to devise, Shakespeare v. Markham, 10 Hun, 311; Ogilvie v. Ogilvie, 1 Bradf., 356; Bowen v. Bowen, 2 Bradf., 336; Williams v. Hutchinson, 3 N. Y., 312; Robinson v. Raynor, 28 id., 494; Parsell v. Stryker, 41 id., 480; Lisk v. Shannon, 25 Barb., 433; Cox v. Cox, 26 Gratt., 305; Sprinkle v. Hayworth, 26 id., 384.

is transferred to the new body which arises out of their fusion.(*t*)

§ **225**. It may here be noticed that if a contracting party become a bankrupt or a liquidating debtor, specific performance cannot be enforced against the trustee without his consent.(*u*)

(*t*) Stanley v. Chester and Birkenhead Railway Co., 9 Sim , 264; S. C., 3 My. & Cr., 773; Earl of Lindsey v. Great Northern Railway Co , 10 Ha., 664 (where the cases of amalgamation establishing this principle are discussed); Clay v. Rufford, 1 Sim. (N S.), 550; Balfour v. Ernest, 5 C. B. (N. S.), 601; Solvency Mutual Guarantee Co. v. York, 3 H. & N., 588. Cf. Ernest v. Nicholls, 6 H. L. C., 401, and as to railway companies see 26 and 27 Vict., ch. 92, § 43.

(*u*) Holloway v. York, 25 W. R., 627 (Jessel, M R.). Cf. Whitworth v. Davis, 1 V. & B., 545; Orlebar v. Fletcher, 1 P. Wms. (6th ed.), 738; Kell v. Nokes, 14 W. R., 908; and Dyas v. Cruise, 2 Jon. & L., 460.

CHAPTER V.

OF THE LIABILITY OF COMPANIES FOR THE CONTRACTS OF THEIR PROMOTERS.

§ **226**. Another very important exception to the general rule, as to parties to the contract alone being parties to the action, is furnished by the doctrine introduced and acted on by Lord Cottenham, that a public company after incorporation may be sued for the specific performance of contracts entered into before the passing of its act by the promoters—on the ground that the company stands in the place of the promoters, or, to use the language of Lord Jeffrey in the court of session, that the fact of "a party having passed from the chrysalis to the butterfly state." (*a*) creates no difficulty in the enforcement of such a contract.

§ **227**. The principle was first introduced in the case of Edwards v. The Grand Junction Railway Co.: (*b*) there Moss, who was the agent of the promoters of a railway, entered into a contract with the trustees of a public highway, whilst the railway bill was before Parliament by which Moss agreed that he would enter into a contract to the effect of certain clauses which the trustees had been desirous to have inserted into the bill, and would get the same confirmed under the seal of the company intended to be incorporated, the contract being expressed to be made on the understanding that the trustees should offer no opposition to the bill, and that the contract should be void on Moss delivering to the trustees the engagement of the intended company to the same effect. The bill passed: the company proposed to make a road across the railway of a narrower width than that stipulated for by the clauses beforementioned: on a bill filed by the trustees against the company for a performance of the contract and an injunction, the company was

(*a*) Caledonian and Dumbartonshire Junction Railway Co. v. The Magistrates of Helensburgh, 2 M'Q., 394.

(*b*) 1 My. & Cr., 650; S. C., 1 Rail. C., 173; before Shadwell, V. C., 7 Sim., 337.

held to be bound by the contract entered into by the promoters before incorporation. "The question," said Lord Cottenham, in delivering judgment,(*c*) "is not whether there be any binding contract at law, but whether this court will permit the company to use their powers under the act in direct opposition to the arrangement made with the trustees prior to the act, upon the faith of which they were permitted to obtain such powers. If the company and the projectors cannot be identified, still it is clear that the company have succeeded to, and are now in possession of, all that the projectors had before, they are entitled to all their rights, and subject to all their liabilities. If any one had individually projected such a scheme, and, in prosecution of it, had entered into arrangements, and then had sold and assigned all his interest in it to another, there would be no legal obligation between those who had dealt with the original projector and such purchaser; but in this court it would be otherwise. So here, as the company stand in the place of the projectors, they cannot repudiate arrangements into which such projectors had entered; they cannot exercise the powers given by Parliament to such projectors in their corporate capacity, and at the same time refuse to comply with those terms upon the faith of which all opposition to their obtaining such powers was withheld." The same principle was subsequently acted on by his lordship in the cases of Stanley v. The Chester and Birkenhead Railway Co.(*d*) and Lord Petre v. The Eastern Counties Railway Co.(*e*)

§ **228**. The conditions under which the doctrine in question is applicable, if they have not been narrowed by subsequent cases, have at least been more clearly defined than they were in the cases already referred to. These conditions seem to be (1) that the company must have taken the benefit of the contract, and (2) that the contract must be for something warranted by the terms of the incorporation.

§ **229**. (1) The company itself, after incorporation, must either have taken the benefit of the contract, or have other-

(*c*) 1 My. & Cr., 672.
(*d*) 3 My. & Cr., 773; S. C., 1 Rail. C., 58; before Shadwell, V. C., 9 Sim., 264.
(*e*) 1 Rail. C., 462. See, also, per Lord Cottenham in Greenhalgh v. Manchester and Birmingham Railway Co., 3 My. & Cr., 791, and in Doo v. The London and Croydon Railway Co., 1 Rail. C., 257; and see Vauxhall Bridge Co. v. Earl Spencer, Jac., 64.

wise recognized it as a contract binding on them. It is not enough that the opposition to the intended bill was withdrawn, as that is a consideration moving, not to the company, but to the promoters. Therefore, where a company was incorporated in consequence of the withdrawal of the plaintiff's opposition, but after that event they had not entered upon any of the land, or in anywise adopted the contract, except by fruitless negotiations, Lord Romilly, M. R., refused specific performance of the contract, and declined to order the defendants to admit the validity of the contract in an action at law :(*f*) and his lordship acted on the same principle in the case, which shortly afterwards came before him, of Preston v. The Liverpool, Manchester and Newcastle Railway Co.(*g*) In The Earl of Lindsey v. The Great Northern Railway Co.,(*h*) Lord Hatherley (then V. C.) explained the principle of these cases in a way strongly supporting the first condition above stated. He considered that the cases did not proceed on the principle of contract through the agency of the promoters, but on the principle that the court will not allow a body to exercise powers acquired by means of a previous contract and arrangement, without carrying that contract and arrangement into full effect. To this extent the court acts negatively ; but having once acquired jurisdiction, then its action is positive as well as negative, and therefore it will not merely restrain the doing of acts contrary to the contract, but will enforce every portion of it. Lord Campbell also, in his judgment in The Eastern Counties Railway Co. v. Hawkes,(*i*) supported the same view of Cottenham's doctrine. But it must be added that Lord St. Leonards, from the observations he made in the last-mentioned case on Gooday v. The Colchester Railway Co.,(*j*) appeared inclined to uphold that doctrine in its utmost generality, and to hold that the conduct of the directors, after the act, in relation to the execution of their powers, cannot absolve them from liability in respect of the benefit which they secured by the withdrawal of the opposition to the bill.

(*f*) Gooday v. Colchester, etc., Railway Co., 17 Beav., 132; Williams v. St. George's Harbor Co., 3 Jur. (N. S.), 1014 (Lord Romilly, M. R.); 2 De G. & J., 547.
(*g*) 17 Beav., 115.
(*h*) 10 Ha., 664.
(*i*) 5 H. L. C., 356.
(*j*) Id., 308.

§ **230**. In Williams v. The St. George's Harbor Co.,(*k*) the company after incorporation had, by an agreement, been made parties to an action by the plaintiff against the promoters on a contract entered into by the promoters before incorporation, and had consented to a judgment in that action. That judgment, by consent, was held to be a sufficient recognition of the contract of the promoters as a contract binding on the company to give the court of chancery jurisdiction.

§ **231**. Where the contract is within the powers of the future company, and is beneficial for the company, and the company sues upon it, the other contracting party cannot, on the ground of want of mutuality, raise any objection to the company's enforcing the contract.(*l*)

§ **232**. (2) The second condition, viz.: that the contract must be for something warranted by the terms of the incorporation, and which the company is, therefore, competent to perform under the powers of its act, is established and illustrated by the case of The Caledonian and Dumbartonshire Junction Railway Co. v. The Magistrates of Helensburgh,(*m*) which came before the House of Lords from the court of session in Scotland. The magistrate of Helensburgh had agreed with the promoters of the railway to afford the projected company certain facilities for the construction of the railway through the town, and to petition Parliament in favor of the bill; and the promoters on their part agreed that the company should pay for the making of a quay and harbor, which the magistrates were to apply to Parliament for powers to make. Lord Cranworth, after animadverting on the general principle introduced by Lord Cottenham, decided the case on the ground that, in the instances before that judge, the acts to be done were within the powers of the company when incorporated, whereas here the object of the arrangement was to apply the funds raised under legislative authority for the purpose of the railway to an object foreign from that of the railway, namely, the construction of a pier and harbor.

§ **233**. Again, in Preston v. The Liverpool, Manchester

(*k*) 2 De G. & J., 547.
(*l*) Bedford and Cambridge Railway Co. v. Stanley, 2 J. & H., 746.
(*m*) 2 M'Q., 391.

and Newcastle-upon-Tyne Junction Railway Co.,(*n*) Lord Cranworth held that a contract to pay £5,000 to a person for not opposing a bill in Parliament would be *ultra vires* of a railway company when incorporated, and, therefore, that it could not be enforced against the company by reason of its having been entered into by the promoters. A very similar decision was pronounced by Kindersley, V. C., in The Earl of Shrewsbury v. The North Staffordshire Railway Co.(*o*) There the promoters had agreed to pay to the plaintiff £2,000 for his support in obtaing their act, and the directors of the company after incorporation had ratified the bargain. It was held to be *ultra vires* of the company and not binding, though entered into by the promoters before the passing of the act.

§ **234**. Not only have these conditions been imposed on the doctrine as laid down by Lord Cottenham, but grave doubts have been thrown on the very principles of his decisions by Lords Cranworth and Brougham, and by Kindersley, V. C. Thus, in the case already referred to of The Caledonian and Dumbartonshire Junction Railway Co. v. The Magistrates of Helensburgh,(*p*) Lord Cranworth, in a written judgment which had before its delivery received the concurrence of Lord Brougham, though deciding the case upon the point before mentioned, fully considered the general principle in question, and disapproved of it. His lordship observed that the doctrine in question could be supported only on the assumption that the company when incorporated is in substance, though not in form, a body succeeding to the rights and coming into the place of the projectors; and then proceeded to show that, in his judgment, it is such a body neither in form nor in substance. The body incorporated, he argued, is not confined to the projectors, and may even include none of them; the act of parliament when passed becomes the charter of the company, prescribing its duties and declaring its rights; and all persons becoming shareholders have a right to consider that they are entitled to all the benefits held out by the act, and liable to no obligation beyond those which are there

(*n*) 5 H. L. C., 605, 621. See, also, Leominster Canal Co. v. Shrewsbury and Hereford Railway Co, 3 K. & J., 654.

(*o*) L. R. 1 Eq., 593.

(*p*) 2 M'Q, 391. See, also, Williams v. St. George's Harbor Co., 3 Jur. (N. S.), 1014 (Lord Romilly, M. R.); 2 De G. & J., 547.

indicated; that to permit other terms to be imposed on the shareholders behind the terms of incorporation, would lead to injury to the shareholders, and often to a fraud, or at least a surprise on the legislature; and that, to render special terms as to particular cases or persons binding on the company, they ought to be the subject of special clauses in the act, whereby the whole truth could be disclosed, and neither the legislature nor any person taking shares could complain. Again, in the case of Preston v. The Liverpool, Manchester and Newcastle-upon-Tyne Junction Railway Co.,(*q*) Lords Cranworth and Brougham expressed similar views of the doctrine, although the ground on which they dismissed the plaintiff's appeal was that the contract was in itself conditional on the construction of the railway. And Kindersley, V. C., in a case already referred to (*r*) expressed himself adversely to Lord Cottenham's view.

§ **235**. In this state of the authorities, it is difficult to speak with certainty as to how far the doctrine in question is to be considered as law; on the one hand, it has been repeatedly acted on by Lord Cottenham, and appears to have been adopted by Lords Campbell and St. Leonards; on the other hand, the principles upon which it rests have been criticised by Lord Hatherley (when V. C.), and have been distinctly disapproved of by Lords Brougham and Cranworth and Kindersley, V. C., upon reasonings, to say the least, of the greatest weight and cogency. In the judgment of Kindersley, V. C., in the case last referred to (*r*) will be found a very careful statement of the reasoning for and against this doctrine of Lord Cottenham. It is difficult to refuse assent to the learned judge's conclusion that "it would be most consonant with legal principle, most just, and most for the public benefit, to hold that contracts of the promoters with landowners are not binding on the company, unless sanctioned by the act constituting the company."(*s*)

(*q*) 5 H. L., 605, affirming the decision of Lord Romilly, M. R., 17 Beav., 115. See the same case before Lord Cranworth as V. C., 1 Sim. (N. S.), 586, as to which see the case before the House of Lords.

(*r*) Earl of Shrewsbury v. North Staffordshire Railway Co., L. R. 1 Eq., 593.

(*s*) L. R. 1 Eq., 615-6.

CHAPTER VI.

OF AGENCY.

§ **236**. The cases which arise where the contract is made by an agent require consideration, as sometimes affording an apparent exception to the rule that parties to the contract only can be parties to the action.

§ **237**. Where agents contract ostensibly as such, and in the names of their principals, little difficulty can occur. The principals here are the proper parties to sue and be sued, and it is, in the absence of special circumstances, improper to make such an agent a party to the action.(*a*) In one case, where an agent having no interest whatever was made a co-plaintiff, the bill was held to be demurrable.(*b*)

§ **238**. Where, on the other hand, agents appear on the face of the contract as principals, the case is different. The principle by which these cases are regulated, is laid down with great clearness by Lord Wensleydale in Higgins v. Senior.(*c*) "There is no doubt," said his lordship, "that where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to,(*d*) and charge with liability on the other,(*e*) the unnamed principals—and this, whether the agreement be or be not required to be in writing by the Statute of Frauds; and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement in pursuance of his authority, is, in law,

(*a*) Johnson v. Ogilby, 3 P.Wms., 277; Smith v. Clarke, 12 Ves., 477, 484; Lisset v. Reave, 2 Atk., 394; Ex parte Hartop, 12 Ves., 349, 352; Clark v. Lord Rivers, L. R. 5 Eq., 91. As to the second ground of demurrer in the last mentioned case, see now Ord. XVI, r. 3.

(*b*) King of Spain v. De Machado, 4 Russ., 225, 241; cf. Glasbrook v. Richardson, 23 W. R., 51 (agent sole plaintiff); and see, as to misjoinder, 15 and 16 Vic., ch. 86, § 49, and Ord. XVI, r. 13.

(*c*) 8 M. & W., 844. Cf. per Knight Bruce, V. C., in Nelthorpe v. Holgate, 1 Coll., 220.

(*d*) See Garrett v. Handley, 4 B. & C., 664; Bateman v. Phillips, 15 East, 272.

(*e*) See Paterson v. Gandasequi, 15 East, 62.

the act of the principal. But, on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement, which cannot be done." The Statute of Frauds, as we shall subsequently see,(*f*) does not require that the authority of the agent should be in writing where the contract is required to be so.[1]

(*f*) Part III, ch. II, § 508.

[1] In reference to the case of Higgins v. Senior, and the rule which it goes to establish, it was said by Mason, J., in Fenly v. Stewart, 5 Sandf. Sup. Ct., 105, after quoting the decision of Mr. Baron Parke, as given in the text, "Now it requires very nice powers of discrimination, we think, to perceive how the introduction of a new party into the contract is not a contradiction of the written instrument, as well as the striking out of a party already in. According to this mode of interpreting the statute, Otis & Co. are liable on the contract before us, because they subscribed it as parties and as principals; they cannot, therefore, be discharged by parol. To discharge them would be to contradict the written instrument and violate the statute; but it is no contradiction of the written instrument, and no violation of the statute, to admit parol proof to show that the defendants, although not named in the contract, are, nevertheless, parties to it, and are to be charged with its performance. They are to be charged as principals, not on their own signature, but on parol proof of the relation in which they stood to Otis & Co., who themselves subscribed the contract as principals. "It is to be observed that the remarks of Baron Parke, which we have quoted, were not necessary to the decision of the question then before the court. The question was not whether the unknown principals should be charged, but whether the defendents, who signed the contract in their own names, could be discharged by parol proof that they were agents merely. His remarks, therefore, although entitled to the highest respect, as coming from a profound and learned jurist, yet have not the weight of an authority, and would not be regarded as such in his own court. The doctrine which he has thus advanced, however, is adopted by Mr. Justice Story, in his work on agency. He says that 'written contract, made by a factor in his own name, for the purchase or sale of goods for his principal, will bind the principal, and he may be sued thereon exactly as if he were named in it, for it is treated as the contract of the principal as well as the agent.' (Story on Agency, § 161.) 'We were not on the argument referred to, and on investigations have not discovered any case, decided in England, supporting the position thus laid down by Baron Park and Judge Story. The cases which come nearest to it are Wilson v. Hart (7 Taunt., 295), decided in 1817, and Truman v. Loder (11 Ad. & Ellis, 589), decided in 1840; but upon examination it will be found that they do not bear out the doctrine. In Wilson v. Hart, although the defendant was made liable for goods where the bought note was signed by one Reed, in his own name, as principal, yet it was distinctly put to the jury to say whether it was a sale to Reed or to the defendant, who had obtained possession of the goods; and whether the mode of the purchase was not a fraudulent device between Reed and the defendant, to enable the latter, by means of it, to get possession of the plaintiff's goods, in order to apply them to the payment of a debt which was due from Reed to the defendant. Baron Parke, in Higgins v. Senior, admits that the case turned altogether on the fraud, and says that if it had not, it would have been an authority for the admission of parol evidence to charge the defendant, and not to discharge Reed. In Truman v. Loder, the defendant was made liable on an executory contract, in which one Higginbotham appeared as principal, and the defendant's name was not mentioned; but the decision was placed expressly on the ground that the defendant, who resided abroad, traded in England under the name of Higginbotham; and that

§ **239**. The proposition at which we have thus arrived, that a person appearing as principal may yet have contracted as agent for another, who may, when disclosed, sue or be sued as principal, is to be qualified by all those con-

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all business done by Higginbotham was his, the defendant's business, and done with his capital and credit. Besides these two cases we have found no express decisions in England apparently sustaining the doctrine of Baron Parke, in Higgins v. Senior, that upon a contract which the statute requires to be in writing, signed by the parties to be charged, a third party, whose name does not appear in the writing, may be charged by parol evidence, that the party signing in his own name acted as an agent for such third party. There are numerous cases in the English books, where a party has been charged on a contract signed by a broker or other person in his own name, without adding to his signature the word agent, or expressing in the mode of signing that he was acting for such party; but in all such cases the name of the party charged is in the body of the memorandum, and it appears from its whole tenor that the party signing acts simply as a broker or agent.'" The learned judge then continues to say that he considered the question had been settled in the cases of Stackpole v. Arnold (11 Mass., 27), Pentry v. Stanton (10 Wend., 271) and Newcomb v. Clarke (1 Denio, 226). And after a brief review of these cases he states the rule to be, that "where a contract is reduced to writing, whether in compliance with the requisitions of the statute of frauds or not, and it is necessary to sue upon the writing itself, there you cannot go out of the writing, or contradict or alter it by parol proof, and consequently cannot recover against a party not named in the writing; but where the contract of sale has been executed, so that an action may be maintained for the price of the goods, irrespective of the writing, there the party who has had the benefit of the sale may be held liable, unless the vendor, knowing who the principal is, has elected to consider the agent his debtor." See, also, United States v. Parmelee, 1 Paines's C. C., 252; Minard v. Mead, 7 Wend., 68, is an authority in support of this rule It was there held that authority by a husband to his wife to give notes, will not subject the husband to the payment of a note given by the wife, in *her own name*, without reference in the body of the note, or in the signature, to the name of the husband. A note to be binding in such a case must purport on its face to have been given by the wife, as the agent, or on behalf of the husband. The case of Spencer v. Field, 10 Wend., 88, carried the principle much farther than Minard v. Mean, and probably to a greater length than would be warranted by the more recent cases. It was there held that a contract, to be obligatory upon a principal, when made by an agent, must be made in the name of the principal. If the agent contract in his own name, *describing himself as agent* or attorney, for his principal, the contract is the contract of the attorney, and not of the principal. Thus A. being principal, and B. his agent, if B. sign a contract, "B. for A.," this is the contract of the agent B. In Newcomb v. Clarke, 1 Denio, 226, it was held that an action upon an express contract must, except in cases of negotiable paper, be brought in the name of the party to whom it was made; and it is not competent to show by parol that the promisee was the agent of another person, for the purpose of enabling such person to sue in his name on the agreement. And the decision, as we have seen, was upheld in Fenly v. Stewart, 5 Sandf., 101. Williams v. Crislee, 4 Duer, 29, is an additional and decisive authority on this point. Bosworth, J., in delivering the opinion of the court, said, "We consider the doctrine well settled, that every *written* contract made by an agent, in order to be binding upon his principal, must purport on its face to be made by the principal, and must be executed in his name, and not in the name of the agent." "It cannot be shown by parol that the alleged agent, in signing his own name to the contract, in fact signed his name as agent, and thus subvert a contract, which, on its face, is his own, into a contract of his alleged principal, and make it enforceable as such. This would be altering the plain meaning and clear legal import of written contracts, by unwritten evidence, which is inadmissible." See Evans v. Wells, 22 Wend., 337; Stephens v. Cooper, 1 John. Ch,, 429. In Massachusetts the rule has not been uniform. The case of Huntingdon v.

siderations as to the reliance of one party on the personal qualities of the other, which have been referred to in considering how far the benefit of a contract is assignable in equity.(*g*) Thus, it appears clear that, if A. contract with

(*g*) See supra, § 203 et seq.

Knox, 7 Cush., 371, rather inclines to the admission of parol evidence to charge the undisclosed principal, although the case seems to have been decided in favor of the plaintiff, upon the ground that the action was not brought upon the written contract itself, but for the price of the goods. A contract was made by one George B. Huntingdon for the sale and delivery of bark. Held, that the bark being the property of Mehitable Hunt, parol evidence was admissible to show that the contract was made for her benefit, and that she was entitled to recover upon it, although the first payment had been made to George B. Huntingdon. See Long v. Colburn, 11 Mass., 97; Emerson v. Providence Man. Co., 12 id., 237; Ballou v. Talbot, 16 id., 461, and Man v. Chandler, 9 id., 335; Contra, Tucker v. Bass, 5 id , 164. In Stackpole v. Arnold, 11 Mass., 27, Chief-Justice Parker, in cases of this nature, accepts only the actual signers of the contract as parties to the suit. But in a later decision—the New England Mar. Ins. Co. v. De Wolfe, 8 Pick., 56—he restricts the rule to instruments under seal. In the case of the Bank of British North America, 5 Gray (Mass.), 567, it was held that a bill of exchange drawn by an agent in his own name, does not bind his principal, though made for his benefit, and containing a direction to the drawee to charge the amount thereof to his account. The law of Kentucky is illustrated in the case of Violett v. Powell, 10 B. Monr., 347. It was there held, that in parol contracts, the principal is bound by any of them made by the agent within the scope of his authority, given, or subsequently recognized, although the contracts are made in the name of the agent, appearing, at the time, to act for himself, so that, in fact, the principal could not have been made responsible. It was further decided, that if an agent take a bond to himself instead of his principal, the parol contract is so far merged in the written agreement that the principal cannot maintain an action on the contract in his own name, but it must be in the name of his agent in the written agreement. But the contract made by the agent is the contract of the principal, in case he is defendant. And if the agency is disclosed at the time of the contract, although it be by deed in writing, if the agent contracts as such, the principal may be sued in an action at law. And if the principal is not known at the time of the contract, and is subsequently discovered, the other party may sue either principal or agent, at his opinion. In Georgia, an instrument executed by an agent will be held binding upon the principal, only where it is evident that the credit was not given to the agent, and the name of the principal was disclosed at the time of the transaction. Merchants' Bank v. Central Bank, 1 Kelly, 418. In Michigan it is said, that where it distinctly appears in the body of a parol agreement, signed by an agent in his own name, without the addition of the name of the principal, that the principal is the contracting party, the agreement will be construed to be that of the principal, and not of an agent. City of Detroit v. Jackson, 1 Doug., 106. In Alabama the same rule is followed as in the State of New York. Clealand v. Walker, 1 Ala., 1058; McTyer v. Steele, 26 id., 487. And see Dawson v. Cotton, 26 Ala., 591, a case of a promissory note under seal. In Mississippi, it was decided in Edwards v. Simmons, 27 Miss. (5 Cush.), 302, that where A. borrowed money of B. and gave his note for it, and C. signed his name as security, trusting alone to A., who did not disclose that he acted as agent for D. or any body, and B. sued D., alleging that A. acted as his agent, D. could not be made liable to B. *unless* proved to be the party trusted. In California, it was held in Ruiz v. Norton, 4 Cal., 355, that the principal may sue on a written contract, made and signed by his agent, without disclosing him as principal; but in order to maintain the action, he must show the agency and the power of the agent to bind him at the time; and the same defenses would be available against the newly discovered principal, as against the agent with whom he dealt as principal.

B. for the performance of anything in which B. may be reasonably taken to have relied on A.'s personal character or qualities, A. cannot declare himself the agent of C. so as to place him in the same position as regards B. that A. held; and, again, if A. were to contract with B. for the purchase from him of an estate which was the property of B., B. could not afterwards declare himself the agent of C.; for C., not having the estate, could not perform the contract. And it may, it is conceived, be laid down that in no case can a contracting party declare himself the agent of an unnamed principal, except where the contract, if really made by the contracting party, might have been assigned by him to the party suing as principal.

§ **240**. In these cases the agent is not a necessary party to the action,(*h*) unless the agency be not proved, or there be special circumstances which may render it proper to make him a defendant; as where the agent claimed to have entered into the contract for his own benefit.(*i*)

§ **241**. The question may sometimes arise whether a party has, on the construction of the contract, entered into it as principal or as agent. The Commissioners of Woods and Forests were by statute authorized to enter into contracts, but the estate remained in the crown: on a contract entered into by them under this authority, it was held on demurrer that they could not be sued for specific performance, but that the contract must be enforced in the ordinary way in the case of estates vested in the crown.(*j*)

§ **242**. In some cases both agent and principal may be sued. Thus in Waller v. Hendon (*k*) there was a contract with the plaintiff for the purchase and renewal of a lease in the name of Hendon or such person as he should nominate or appoint. He nominated Cox, declaring he bought for him as his agent. It was ordered by Lord Macclesfield, affirming a decision at the rolls, in a suit (in which both Hendon and Cox were defendants), for payment of the residue of the purchase-money, that they should both pay it, and that if Hendon paid it he might prosecute the decree against Cox.

(*h*) Kingsley v. Young, Dan. Ch. Pr., 177.
(*i*) Taylor v. Salmon, 4 My & Cr., 134. See, also, Lees v. Nuttall, 1 R. & My., 53; Nelthorpe v. Holgate, 1 Coll., 203; supra, § 155; and cf. Marshall v. Sladden, 7 Ha., 428, and Weise v. Wardle, L. R. 19 Eq., 171.
(*j*) Nurse v. Lord Seymour, 13 Beav., 254.
(*k*) 5 Vin. Ab., 524, pl. 45.

§ **243**. Directors of a public company are agents of the company, and their personal liability upon contracts entered into by them is governed by the ordinary law of principal and agent. "Wherever an agent is liable," said Lord Cairns (then L. J.), in Ferguson v. Wilson,(*l*) "those directors would be liable; where the liability would attach to the principal and the principal only, the liability is the liability of the company." Accordingly it was held, in the last-mentioned case, that the directors of a railway company were not liable to indemnify or pay damages to the plaintiff in respect of a resolution of the board under which the plaintiff alleged that he was entitled to have shares in the company allotted to him; the resolution being, if anything, a contract between the plaintiff and the company. On the other hand, where directors of a company signed a contract (for a lease), on the face of which the court considered the presumption to arise that they were, as between them and the plaintiff (the lessor) principals, they were held personally liable to perform the contract, notwithstanding that the plaintiff had, in correspondence, treated the company as liable to execute the contract.(*m*)

§ **244**. In the case of a contract by an agent as a principal, the agent might, at common law, sue in his own name, without in any way joining the real principal. In chancery, however, a suit could not be maintained by the agent unless his real principal were in some shape a party to the suit.(*n*)

§ **245**. The principle already stated (*o*) that a person appearing on a contract as principal, though really an agent, is yet liable on the contract as principal, applies in cases of specific performance in equity (*p*) as well as in actions for damages,(*q*) and accordingly such an agent may be sued without the principal. In Chadwick v. Maden,(*r*) where the contract was in the name of the agent, who contended that, being merely such, the bill should be dismissed as against him, Turner, V. C., said that "the signature of the agreement was sufficient to subject him to the liability of

(*l*) L. R. 2 Ch., 77. Cf. Wilson v. Lord Bury, 29 W. R., 272-3.
(*m*) Kay v. Johnson, 2 H. & M., 118.
(*n*) Per Lord Lyndhurst in Small v. Attwood, You., 457. See S. C., 6 Cl. & Fin., 232.
(*o*) Supra, § 238.
(*p*) Corless v. Sparling, I. R. 8 Eq., 335; 21 W. R., 876; Saxon v. Blake, 29 Beav., 438.
(*q*) Jones v. Littledale, 6 A. & E., 486; Magee v. Atkinson, 2 M. & W., 440; Cf. Long v. Millar, 4 C. P. D., 450.
(*r*) 9 Ha., 191.

performing it." In that case, after a lot had been knocked down to him, A. declared himself an agent for C., who was present, and asked to have the contract drawn up in C.'s name, which was refused, and then signed it himself; it was there held that A. was personally liable on the contract. It would, however, appear on principle, that if, at the time the contract was signed, both A. and B. understood that A. was acting merely as agent for C., and B. were afterwards to sue A. for specific performance as principal, A. might allege the understanding between himself and B. at the time, and give parol evidence of it, and that, if the allegation were proved, it might furnish a valid defence. And in many cases it is obvious that an action for specific performance against an agent alone would fail, from the incapacity of the agent to perform it.(*s*)

§ **246**. There are, however, special circumstances which sometimes occur and make it proper that an agent should be a party to an action for specific performance. In almost all these cases the agent is an agent and something more.

(1) The claim by the agent to an interest in the property in question is one of these cases; and there the agent may be a party.(*t*)

(2) The contract, as we have already seen, may be so framed as to give a right of action against both principal and agent.(*u*)

(3) The agent of the vendor often becomes by the contract a stakeholder of the deposit paid by the purchaser, and in that character he may be a proper party to an action.

§ **247**. Thus where a stakeholder threatens to pay over the deposit to the vendor he may properly be made a party to an action by the purchaser.(*v*) Where the stakeholder had paid over the deposit to the vendor, and difficulties had arisen in completing the contract because the deposit was not forthcoming, the purchaser made the stakeholder a party to a bill filed for specific performance, and was held entitled to a declaration that the stakeholder was (jointly with the vendor) liable to make good the deposit, which was required to discharge a mortgage on the property.(*w*) So, again, the

(*s*) See infra, § 969 et seq.
(*t*) Taylor v. Salmon, 4 My. & Cr., 134; Heard v. Pilley, L. R. 4 Ch., 548. Distinguish Glasbrook v. Richardson, 23 W. R., 51.
(*u*) Waller v. Hendon, supra, § 242.
(*v*) Cutts v. Thodey, 13 Sim., 206; 1 Coll., 223, n.; Fenton v. Hughes, 7 Ves., 287.
(*w*) Wiggins v. Lord, 4 Beav., 30.

auctioneer has repeatedly been made a defendant to bills by the vendor or those claiming under him, and has been ordered to pay the deposit (less his charge [*x*]) into court.(*y*) And on account of the auctioneer's right to bring an action for the deposit, and of his liability in respect of it, it has been said that he can be made a co-plaintiff with the vendor;(*z*) or he may interplead.(*a*)

§ **248**. Still, although it is the law that a stakeholder or auctioneer holding a deposit may be made a defendant, the proper practice is not to make him a defendant when the deposit which he holds is small; unless, being applied to pay it into court, he refuses to do so. Where the deposit is large, the depositee may properly be made a defendant if he has not paid it into court before action.(*b*)

§ **249**. The auctioneer being agent for both vendor and purchaser, and receiving the deposit as a stakeholder, is liable to an action for it if the sale goes off,(*c*) although he be also solicitor for the vendor;(*d*) and where the contract provided "that a deposit of £350 should be paid in part of the purchase-money to" the vendor's solicitors, it was held that they were stakeholders;(*e*) but the vendor's agents,(*f*) including solicitors to whom the deposit is paid, "as agents for the vendor," are not stakeholders.(*g*)[1]

(*x*) As to this, see St. Leon. Vend., 51-2, and Blenkhorn v. Penrose, 29 W. R., 239.
(*y*) Annesley v. Muggridge, 1 Mad., 593; Yates v. Farebrother, 4 id., 239. Cf. Blenkhorn v. Penrose, 29 W. R., 239.
(*z*) Dan. Ch. Pr., 176.
(*a*) Hoggart v. Cutts, Cr. & P., 197.
(*b*) Earl of Egmont v. Smith, 6 Ch. D., 469, 474-5.
(*c*) Grey v. Gutteridge, 1 Man. & Ry., 614. Harington v. Hoggart, 1 B. & Ad., 577.
(*d*) Edwards v. Holding, 5 Taun., 815.
(*e*) Wiggins v. Lord, 4 Beav, 30.
(*f*) Duke of Norfolk v. Worthy, 1 Camp., 337; Hurley v. Baker, 16 M. & W., 26.
(*g*) Edgell v. Day, L. R. 1 C. P., 80.

[1] *Pleadings, what they must show.*] The pleadings must render clear the rights of the parties seeking specific performance; if they do not do so it will be refused. Waters v. Brown, 7 J. J. Marsh., 123. Fraud must be alleged. Lawyer v. Mills, 20 L. J. Ch, 80; Maguioc v. Thompson, 2 Wall. Jr., 209; Ellerbee v. Ellerbee, 42 Ala., 643. The plaintiff must show that he cannot be indemnified in damages if the contract is broken. Powel v. Central Plankroad Co., 24 Ala., 441; McCloud v. White, 5 Minn., 178. A demurrer will lie if he does not do so. Bottsford v. Beers, 11 Conn., 369; Prewitt v. Jenkins, 1 Blackf., 294; Noyes v. Marsh, 123 Mass., 286; Kauffman's App., 55 Pa. St., 383. In an action for the specific performance of an agreement to sell land, it was held that the bill might be so shaped as either to obtain specific performance, or that the contract be canceled. Mills v. Metcalf, 1 A. K. Marsh., 477. In Pitts v. Cable, 44 Ill., 103, it was held that a bill which seeks specific performance must be framed with that view. Land was sold under an order of the court, and the purchaser failed to complete his purchase; the officer making the sale, who is the only necessary party complainant, could file his bill for specific performance, without direction of the court; a demurrer will not lie. Boune v. Ritter, 26 N. J. Eq., 456. The plaintiff must show

affirmatively that he is entitled to relief. He need not, however, allege that the defendant has the ability to perform. Morey v. Farmers' Loan, etc., 14 N. Y., 302; Clough v. Hart, 8 Kan., 487; Greenfield v. Carlton, 30 Ark., 547. The rules of pleading are less stringent than they are at law; but they are equally regulated by principle. Adams' Eq., 301. As to what was a sufficient complaint in an action to compel a conveyance, see Morrow v. Lawrence, 7 Wis., 574. In the case of a grant, a deed must be alleged. King v Tice, 3 Ired. Eq., 568. Matters which the court takes judicial notice of, need not be set out in the pleadings. United States v. La Vengeance, 3 Dallas, 297; Owings v. Hall, 9 Pet., 607. Where the Statute of Frauds applies to the contract, the bills is demurrable. Chambers v. Lecompte, 9 Mo., 575. As to where the statute of limitations applies, see Dunlap v. Gibbs, 4 Yerg., 94; Wisner v. Barnett, 4 Wash. C. C., 631; Field v. Wilson, 6 B. Mon., 479; Maxwell v. Kennedy, 8 How., 210. Where a contract was to have been approved by a corporation, and was signed by its president, the fact that he was such officer must be set forth. Buffalo Catholic Inst. v. Betta et al., 87 N. Y., 250.

Rule as to what the bill must show.] Great accuracy of averment, and strict corresponding proof, are required in an action for specific performance. Daniel v. Collins, 57 Ala., 625; Hunter v. Daniel, 4 Hare, 420; Forsythe v. Clarke, 3 Wend., 657. The contract should be particularly stated. Light St. Bridge Co. v. Bannon, 47 Ind., 129. A waiver of objection to title was the ground relied upon for specific performance. Held, that that question must be put in issue by the pleadings, in order that evidence might be given to prove such waiver. Page v. Greeley, 75 Ill., 400. After a decree had been made; held, that it should not be set aside, because of defects in the petition. Despain v. Carter, 21 Mo., 231. The legal title must be shown to be subordinate to the equitable title under which the plaintiff claims. Cameron v. Abbott, 3 Ala., 415. Where an action is brought against heirs, and to specifically enforce their ancestor's contract, it must be averred and proved that the estate is not in process of administration, and that the defendant has assets of such ancestor in his hands. Taylor v. Roland, 26 Texas, 293. A. assigned to B. all his interest in an undivided estate. Held, that B.'s bill must show that A., at the time of the assignment, had an interest, and furnish the data from which such interest might be ascertained. Bogan v. Camp., 30 Ala., 276. The pleadings need not allege that the vendor died seized, or that title is in defendant. Moore v. Burvams, 34 Barb., 173. Where an agent executed a contract, the pleadings must show that he was duly authorized. Roby v. Cossitt, 78 Ill., 638; Columbine v. Chichester, 2 Phil., 27; *contra*, Hardings v. Parshall, 56 Ill., 219; Fisher v. Bowser, 41 Texas, 222. They need not show the mode of execution, nor the manner in which the agreement was satisfied by the principal. Hanchett v. McQueen, 32 Mich., 22; Harding v. Parshall, 56 Ill, 219; Gilpin v. Watts, 1 Col., 479. As to trust funds in agent's hands, see Gerrish v. Towne, 3 Gray, 82. All the essential terms of a contract must be clearly and definitely alleged as well as proved. Jones v. Jones, 49 Texas, 683; Anthony v. Leftwitch, 3 Rand. (Va.), 238; Gaskins v. Reebles, 44 Texas, 390; Wiley v. Mullins, 22 Ark., 294. Where the object of the action is to charge particular defendants, the pleadings must show a case against them by proper legal averments. Seager v Burns, 4 Minn., 141. It is no objection that the exact agreement relied upon, is set out in the pleadings. New Barbadoes Toll Bridge Co. v. Vreeland, 4 N. J. Eq., 157. Where the contract relied upon is required to be in writing, the pleadings will be had on demurrer, if they do not show that it was so. Barkworth v. Young, 4 Deem, 1; Logan v. Bond, 13 Yes., 192; Piercy v. Adams, 22 Ga., 109; Carlisle v. Brennan, 67 Ind., 12. Walworth, Chancellor, said in Cosine v. Graham, 2 Paige Ch., 177: "If it is stated generally that an agreement or contract was made, the court will presume it a legal contract until the contrary appears; and the defendant must either plead the fact that it was not in writing, or insist upon his defense in the answer." See, also, Wildbachu v. Bibidoux, 11 Mo., 659; Richards v. Richards, 9 Gray, 314; Cranshon v. Smith, 6 R. I., 231; Farnham v. Clements, 51 Me., 426; Dudley v. Batchelder, 53 id., 403; Hubbel v. Courtney, 5 S. C., 87. Specific performance will not be decreed of an agreement which differs materially from the one set out in the pleadings. Harris v. Knickerbocker, 5 Wend., 638. As to how land should be described in pleadings, see Gray v. Davis, 3 J. J. Marsh.,

381; Allen v. Chambers, 4 Ired. Eq., 125; Mallory v Mallory, 1 Bush. (N. C.), Eq., 80; Sanderson v. Stockdale, 11 Md., 563; Bast v. Alford, 20 Texas, 226; Goodenow v. Curtis, 18 Mich., 298; Baker v. Hathaway, 5 Allen, 103. In Abbott v. Dunivan, 34 Mo., 148, it was held that either party might aver and prove a mistake in the description of the land, in a contract sought to be specifically enforced. Where a vendor seeks to enforce specific performance by a sale of the land and application of the proceeds to the satisfaction of the consideration, he should allege in the pleadings, and prove, that the defendant agreed to pay the consideration. Copehart v. Hall, 6 W. Va., 547; Park v. Johnson, 4 Allen, 259 As to allegations of performance, all the facts constituting performance should be alleged in the pleadings; it is not enough to aver "that he has done all that he is bound by the contract to do," or "that he has offered, and has always been ready and willing, to comply with his contract." The pleadings must show that the complainant has fully performed everything necessary to entitle him to performance of the contract by the defendant. Bates v. Wheeler, 2 Ill., 54; Underhill v. Allen, 18 Ark., 466; Brown v. Hayes, 33 Ga. Supp., 136; McLeroy v. Tulane, 34 Ala., 78; Bell v. Thompson, id., 633; Columbine v. Chichester, 2 Phil., 27; Davis v. Harrison, 4 Litt., 261; Hart v. McClellan, 41 Ala., 251; Duff v. Fisher, 15 Cal., 375; Low v. Heck, 3 W. Va , 680; Roy v. Willink, 4 Sandf. Ch.. 525; Bass v. Gilliland, 5 Ala., 761; Moore v. Higbee, 45 Ind., 487. As to insufficient allegations relative to a trust, see Pearson v. East, 36 Ind.. 27; Hanser v. Roth, 37 id., 89. Where the pleadings alleged that the purchase money had all been paid, and offered to pay whatever sum might be found to be due—held, sufficient, although a part of the money was found to be still due. Mix v. Beach, 46 Ill., 311. Partial performance was alleged in the pleadings. Held, that the plaintiff need not formally allege a readiness to complete the performance. Hatcher v. Hatcher, 1 McMullan Ch., 311.

As to mutual and concurrent acts.] The pleadings in an action to enforce the specific performance of an agreement, in which the acts to be done by the parties are mutual and concurrent, was held good, where they alleged an offer to perform by the plaintiff and a refusal by the defendant. St. Paul Div. v. Brown, 9 Minn., 157.

As to amendments, see Chess' App., 4 Pa. St., 52.

As to consent] Where consent is necessary in order to enable the plaintiff to perform the contract—held, that the pleadings need not allege that such consent was obtained. Smith v. Capron, 7 Hare, 185.

As to refusal and demand.] Where an action is brought to enforce an obligation to convey, absolute on its face, and the consideration is acknowledged, the pleadings need only aver a request and a refusal. Founger v. Welch, 22 Texas, 417; Holman v. Aiswell, 15 id., 394. The pleadings should state that the vendor had been requested to make title; his insolvency will not excuse the necessity of such request Carter v. Thompson, 41 Ala., 375. In Dodge v. Clark, 17 Cal., 586, the omission of an allegation of demand was held to be fatal.

As to damages.] The particular injury must be alleged and proved, where damages are claimed; it will not answer to aver that the plaintiff has sustained damages. Clinock v. March. of Ely, 2 H. & M., 220. Where a note has been lost, the pleadings must allege that the same has not been paid. Mason v. Foster, 3 J. J. Marsh., 283.

Relief; general prayer for.] The complaint should be dismissed, notwithstanding the complainant may be entitled to some relief: where the pleadings contain no prayer for general relief, and where they do not justify the relief prayed for. Boyl v. Laird, 2 Wis., 431; State of Conn. v. Sheridan, 1 Clark (N. Y.), 533. It is error to grant it, where neither party asks for specific performance. Cantrell v. Rice, 6 J. J. Marsh., 338.

Affirmative relief—cross-bill.] The defendant must file a cross-bill, if he wishes affirmative relief, in an action for specific performance. Hanna v. Rattikin, 43 Ill., 103; Bussey v. Gart, 10 Humph., 238; Wright v. Delafield, 25 N. Y., 266. Where the answer admitted the contract, no cross-bill need be filed. Dorsey v. Campbell, 1 Bland. Ch., 356. Where the purchaser files a

bill for specific performance, after the time fixed in the agreement, the vendor may, by answer, submit to perform, and file a cross-bill, and compel the purchaser also to perform. Held, that he cannot, in such case, resist fulfillment, and, after depreciation of the property, enforce specific performance against the purchaser. Tobey v. Freeman, 79 Ill., 489.

Bill dismissed.] The cross-bill, with the original bill, makes but one action; and, when the originall bill is dismissed, such dismissal carries with it the dismissal of the cross-bill. Elderkin v. Fitch, 2 Carter, 90. The cross-bill is a matter of defense, and it should not set up anything not contained in the original action. May v. Armstrong, 3 J. J. Marsh., 262; Daniel v. Morrison, 6 Dana, 186; Fletcher v. Wilson, 1 Lon. & Marsh. Ch., 376; Galiatin v Erwin, Hopk. Ch., 48; S. C., 8 Cow., 361; Josey v. Rogers, 13 Ga., 478; Slason v. Wright, 14 Vt., 208; Rutland v. Page, 24 id., 181; Draper v. Gordon, 4 Sandf. Ch., 210. In Nelson v. Dunn, 15 Ala., 501, it was held that a cross bill is not restricted to the issues of the original action. The written obligation on which the claim was based, was set out in the plaintiff's bill; the cross-bill did not set it out. Held, that it need not do so. Coe v. Lindley, 32 Iowa, 437.

Equitable counterclaim under the Codes of the several States.] The equitable counterclaim may take the place of a cross-bill, under the system of pleadings adopted by the codes in the several States where they are used. McAbee v. Randall, 41 Cal., 136.

Change of parties.] When a cross-bill is filed by the defendant, in which he seeks affirmative relief, he becomes the plaintiff, and the plaintiff in the original action becomes the defendant in the cross-bill. Ewing v. Patterson, 35 Ind., 326.

Statute of frauds—demurrer.] The statute of frauds must, in all cases, be pleaded; it differs, in that respect, from the statute of limitations. Where it is not done, a general demurrer is proper. Ridgway v. Wharton, 3 De G. M. & G., 691; Wright v. Le Clair, 4 Green (Iowa), 420; Field v. Hutchinson, 1 Beav., 599; Wood v. Midgley, 5 De G. M. & G., 41; Adams v. Patrick, 30 Vt., 576; Hall v. Peer, 27 Ill., 312; Meach v. Perry, 1 D. Chip (Vt.), 182; Dryer v. Martin, 4 Scam., 146; Hollingshead v. McKenzie, 8 Ga., 457; Grant v. Craigmiles, 1 Bibb., 203. A general denial does not raise the issue of the statute of frauds. Livesey v. Livesey, 30 Ind., 398 Where the answer admitted a *parol contract*, the defendant must plead the statute of frauds, in order to avail himself of it. Irildbahm v. Robidoux, 11 Mo., 659; Walker v. Hill, 21 N. J. Eq., 191; Albert v. Winn, 5 Md., 66; Talbot v. Bowen, 1 A. K. Marsh., 436; Small v. Awings, 1 Md. Ch., 363; Artz v. Grove, 1 Md., 456; Newton v. Swazey, 8 N. H., 9; Tilton v. Tilton, 9 id., 385; Dean v. Dean, 9 N. J. Eq., 425; Smith Braisford, 1 Des. Eq., 350; Hutchinson v. Hutchinson, 4 Des., 77; Savir v. Dulin, 6 Jones' Eq., 195; Morrell v. Cooper, 65 Barb., 51.

Defense that land is homestead.] Where the defendant wishes to avail himself of this defense, he must set it up in his pleadings. Brown v. Eaton, 21 Minn., 409. The wife refused to release her dower. Held, that the defense would not avail, where the vendee offered to waive the release. Carson v. Mulrany, 49 Pa. St., 88.

New matter.] It is no ground for denying the relief asked for, that new matter has been set up not responsive to the allegations of the bill, and not supported by the proof. Smoot v Rea, 19 Md., 398; see Laverty v. Moore, 33 N. Y., 658.

PART III.

OF THE DEFENSES TO THE ACTION.

CHAPTER I.

OF THE INCAPACITY TO CONTRACT.

§ 250. The incapacity to contract of either of the parties to a contract furnishes ground on which that party may resist specific performance; and on the principle of mutuality hereafter to be considered it may also furnish a defense to the other party, though himself perfectly competent. The incapacity to contract, and the incapacity to execute a contract, are, of course, different questions; the one must be judged of at the time of the contract, the other when its performance is sought.[1]

[1] *Personal incapacity.*] It is a perfect defense to an action for specific performance, that the plaintiff, at the time of filing the bill, was personally incapable of performing. Flight v. Bolland, 4 Russ., 298; Richards v. Green, 23 N. J. Eq., 538. Specific performance will, of course, not be decreed, when the defendant cannot perform the agreement. This is true even where he has, by his wrongful act, made it impossible. Green v. Smith, 1 Atk., 572; Danforth v. Phila. R. R. Co., 30 N. J. Eq., 12; Columbine v. Chichester, 2 Phila., 27; Hallett v. Middleton, 1 Russ., 243; Ellis v. Coleman, 4 (Jur. S.), 350; Phillips v. Stanch, 20 Mich., 369; Danton v. Stewart, 1 Cox, 258; Greenaway v. Adams, 12 Ves., 395; Smith v. Kelley, 56 Me., 64; Gumpton v. Gumpton, 47 Mo., 37; Renkin v. Hill, 49 Iowa, 270; Stearns v. Beckham, 31 Gratt., 379.

Homestead law in Iowa.] In this State a husband agreed to convey land in which there was a homestead right in his wife. She refused to consent. Held, that specific performance would not be decreed. Yost v. Devault, 9 Iowa, 60; Barrett v. Mendenhall, 42 id., 296; Long v. Brown, 66 id., 160; see as to bad faith in the parties in such a case. Peeler v. Levy, 26 N. J. Eq., 330.

Partial performance only, possible.] It is the substance, rather than the form of contracts, which equity regards; and the impossibility of a literal fulfillment will not operate as a defense, when it can be substantially carried out. Shaw v. Livermore, 2 Green (Iowa), 338; Phila. R. R. Co. v. Lehigh, etc., Co., 36 Pa. St., 204; Hart. v. Brand, 1 A. K. Marsh., 159; Oliver v. Crosswell, 42 Ill., 41.

Partial ability.] A defendant must perform, so far as he is able, and equity will compel him to do so. A ratable abatement of the contract may be decreed. Rankin v. Maxwell, 2 A. K. Marsh., 488; Weatherford v. James, 2 Ala., 170; Jacobs v. Sale, 2 Ired. Eq., 286; Henry v. Lisles, 2 id., 407; Wright v. Young, 6 Wis., 127; Ketchum v. Stout, 1 Head (Tenn.), 251; Bell v. Thompson, 34 Ala., 633; Ketchum v. Stout, 20 Ohio, 453; Covell v. Cole, 16 Mich., 223; Marshall v. Caldwell, 41 Cal., 611; Meek v. Walthall, 20 Ark., 648.

§ **251**. The question as to the capacity of persons to contract, as raised in actions for specific performance, being for the most part identical with the question as discussed at common law, and having no peculiar relation to the jurisdiction in specific performance, it is proposed only to refer to a few points of practical importance which may arise in actions of this nature.

§ **252**. The peculiar doctrines of equity with relation to married women make it necessary to allude to their capacity to contract. The principle on which the court proceeds is, that if a married woman have not separate property, she cannot, at any rate as a general rule,(*a*) contract at all; and if she have, she can contract, but only in respect of that, and the remedy is only against it, and not *in personam* against her.(*b*) "A *feme covert*," said Lord Cottenham,(*c*) "is not competent to enter into contracts so as to give a personal remedy against her. Although she may become entitled to property for her separate use, she is no more capable of contracting than before; a personal contract would be within the incapacity under which a *feme covert* labors."[1]

(*a*) See the case of Vansittart v. Vansittart (4 K. & J., 62, affirmed 2 De G. & J., 249), infra, § 259.

(*b*) Francis v. Wigzell, 1 Mad., 258; Aylett v. Ashton, 1 My. & Cr., 105. See, also, Humphreys v. Hollis, Jac., 73.

(*c*) 1 My. & Cr., 111, 112.

[1] A *feme covert* will be treated as a *feme sole*, only as to the disposition of her separate property; and her power of disposing of property, settled to her separate use, will be governed by a strict interpretation of the powers given by the settlement. Methodist Church v. Jacques, 3 John. Ch., 77. And, therefore, where a wife had power, under a marriage settlement, to "give and bequeath" the property, at her death, "to whomsoever she pleases," but had no separate estate, and she executed an instrument under the power, therein styled a "will," and appointed A. her "executor;" held, that such instrument was a mere execution of the power, and that A. therefore was not an executor," but that he was an appointee in trust, and that the property vested in him for the benefit of creditors and legatees. Leigh v. Smith, 3 Ired. Ch., 442. But where a *feme covert* has a separate estate, she may dispose of it as she pleases, even to her husband, if done freely and voluntarily, and the court will confirm her disposition. Dallam v. Wampole, Pet. C. C., 116. She may mortgage her separate estate for her husband's debts; and a power of sale, in such mortgage, pursuant to the statute, is valid. Demarest v. Wynkoop, 3 John. Ch., 129 (Kent, Ch.). A married woman being, as to her separate estate, treated as a *feme sole*, may, in person, or by her agent, bind the estate for the payment of debts contracted upon the credit of such estate; and the assent of her trustee is not necessary, if the instrument creating the trust contains no restriction upon her power. North American Coal Co. v. Dyett, 7 Paige, 9. And she may bind her separate estate for debts contracted by her, on the credit of such estate, even though her husband should be the creditor. Gardner v. Gardner, 7 Paige, 112. A *feme covert* is, in all cases, to be treated as a *feme sole*, in respect to her separate estate, so far as to dispose of it in any way, not inconsistent with the terms of the instrument under which she holds. Leaycraft v.

§ 253. If the contract in question relate to the woman's separate property not fettered by a restraint on anticipation, her contract with regard to it will clearly bind. But if that be not the case, as, for example, if a married woman agree to purchase or lease a house, then the mere fact of her possessing separate estate is not sufficient to enable the other party to enforce performance as against the separate estate. The engagement here will be of that description which has been called the general engagements of a married woman, and in order to bind the separate estate by such an engagement it should appear that the engagement was made with

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Hedden, 3 Green's Ch., 512. And if, by the deed, the wife is permitted to dispose of her separate property by deed, will, or otherwise, at her pleasure, her right of disposition remains as before marriage, in respect to her estate. But if the terms of the deed require a particular mode of disposition, then, as clearly those terms must be observed, her power is limited by them, and she is a *feme sole sub modo*, and only to the extent of the power expressed. Id. The same doctrine is repeated in Clark v. Makenna, 1 Chev., 163 (2d part); Morgan v. Elam, 4 Yerg., 375; Vizonneau v. Pegram, 2 Leigh, 183; and Williamson v. Beckham, 8 id., 20. A *feme covert*, with the consent of her trustee, may reinvest her separate trust property as she may think proper. Frazier v. Center, 1 McCord's Ch., 270. Where a married woman, by a contract under seal, charged the payment of a debt on her real estate, which was settled on her by a deed of trust, with a power to sell and convey, and absolutely dispose of the same by deed, her coverture notwithstanding, it was held that a court of equity would enforce such a contract, and decree a sale of the land to pay such charge, and that the power given her to sell, necessarily, included the power to incumber it by mortgage, or charge it by contract. Price v. Bigham, 7 Har. & J., 296. The separate property of a *feme covert* was sold on execution against such property as had come to her by descent or devise from the debtor, and the husband received the surplus proceeds of the sale, and died. Held, that the wife was not bound by the act of her husband, and that—the money not having been applied to the benefit of her separate estate—she was not bound to refund it on the reversal of the judgment, and the recovery of the land by her. Wood v. Genet, 8 Paige, 137. Where a husband purchases real estate, in his own name, with the money of the wife, a purchaser, with notice of these facts, will be held to be a trustee for the wife. Methodist Church v. Jacques, 1 John. Ch., 450. The wife's equity in her separate personal or real estate, devised or descended to her during coverture, may, in a proper case, extend to the whole estate; and it cannot be defeated by any act of the husband. Haviland v. Bloom, 6 John. Ch., 178. A *feme covert* may become the debtor of her husband, by borrowing money of him, for the benefit of her separate estate. Gardner v. Gardner, 22 Wend., 526. But though her estate may become liable, in equity, for debts contracted in reference to such estate; yet, in order that it shall be bound, it must distinctly appear that the dealings were *bona fide* with her, and that goods were delivered, or the money paid, to her own order, or into her hands. Magwood v. Johnson, 1 Hill Ch., 228. And the separate property of a wife, settled upon her at her marriage, is not primarily liable for her debts contracted before marriage. Knox v. Picket, 4 Des., 92; See McKay v. Allen, 6 Yerg., 44. The wife of a person perpetually banished, is, for the purpose of contracting or maintaining suits, to be treated as a *feme sole*. Troughton v. Hill, 2 Hayw., 406. See, further, as to the separate property of a *feme covert*, the cases of Brundige v. Poor, 2 Gill. & J., 1; Tiernan v. Poor, 1 id., 216. The rights of married woman under the laws of New York are well digested in The Saratoga Co. Bk. v. Pruyn, 90 N. Y., 250.

reference to and upon the faith or credit of that estate," and "whether it was so or not is a question to be judged of * * * upon all the circumstances of the case."(*d*)

§ **254.** In one case, a married woman possessed of separate estate, and living separate from her husband, verbally contracted to take a leasehold house for a term.(*e*) The contract was reduced into writing, signed by the lessor's agent, and handed to the married woman; she retained it, without executing it, or any counterpart of it, but in letters written by her referred to it as a contract, and she entered into possession. In a suit by the lessor against her and her trustees to enforce payment of rent, as a charge on her separate estate, Knight Bruce, V. C., held that she would have been bound, if she had been a *feme sole*, and that, being married, she was bound to the extent of her separate estate.

§ **255.** As regards separate property settled to the use of a married woman without power of anticipation, she has no power to contract so as to bind such property.(*f*)

§ **256.** If a married woman have a power to be exercised in a specific way, and she affect to contract by an exercise of the power, but without the essential formalities required, there will be no judgment against her; for, except under these formalities, she has no power to contract, and the paper signed by her is as void as any other contract signed by a married woman.(*g*) But where the formalities omitted are immaterial for the protection of the married woman, her estate may be bound by the exercise of the power, and the contract constituted by such exercise may be specifically enforced.(*h*)

§ **257.** In actions for the enforcement of contracts against the separate estates of married women, the usual and proper parties are the woman herself, her husband (*i*) and the trustees (if any) of the separate property.(*j*) The trustees are not always necessary parties;(*k*) but in their absence the

(*d*) Johnson v. Gallagher, 3 De G. F. & J., 494, 515; London Chartered Bank of Australia v. Lempriere, L. R. 4 P. C., 572. See, too, Picard v. Hine, Id. 5 Ch., 274, and per Jessel, M. R., in Wainford v. Heyl, id. 20 Eq., 324.

(*e*) Gaston v. Frankum, 2 De G. & Sm., 561.

(*f*) Walrond v. Walrond, John., 18.

(*g*) Martin v. Mitchell, 2 J. & W., 413, 434.

(*h*) Hopkins v. Myall, 2 R. & M., 86; Dowell v. Dew, 1 Y. & C. C. C., 345; Thackwell v. Gardiner, 5 De G. & Sm., 58; Phillips v. Edwards, 33 Beav., 440.

(*i*) Hancocks v. Lablache, 3 C. P. D., 197. Cf. Ord. XVI, r. 8.

(*j*) See Hulme v. Tenant, 1 Bro. C. C., 16; Murray v. Barlee, 3 My. & K., 209.

(*k*) Picard v Hine, L. R. 5 Ch., 274; Davies v. Jenkins, 6 Ch. D., 728.

plaintiff may find it impracticable to obtain complete relief.(*l*)

§ **258**. As regards the real estate of a married woman not settled to her separate use or subject to her power, she may, under the act for the abolition of fines and recoveries,(*m*) not only dispose of the land, but contract respecting it, if not so as to render herself liable to damages, yet so as to bind her estate of inheritance.(*n*) The only other modes by which a married woman can bind such real estate (including, it would seem, her share in the proceeds of land vested in a trustee and directed to be sold(*o*), are by fraud or by election, or, perhaps, sometimes by agreement with her husband when dealing with him at arm's length.(*p*)[1]

§ **259**. As regards dealing between a husband and wife, Lord Hatherley, when a vice-chancellor, in more than one case intimated his opinion that the power of a wife to contract with her husband is not confined to her separate property, but that "under any circumstances, when the wife is put in such a position that she can be regarded for the purposes of the contract as a *feme sole*," she may so contract.(*q*) The learned judge considered that the case of Bateman v. Countess of Ross,(*r*) supports this proposition. The last-mentioned case is not very fully reported; and it

(*l*) Collett v. Dickenson, 11 Ch. D., 687; Flower v. Buller, 15 id., 674 As to actions by married women respecting separate estate, see the Married Women's Property Act, 1870, § 11; per Jessel, M. R., in Howard v. Bank of England, L. R. 19 Eq., 30); Roberts v. Evans, 7 Ch. D., 830; and Ord. XVI, r. 8.

(*m*) 3 and 4 Will. IV, ch. 74. Cf. Toler v. Slater, L. R. 3 Q. B., 42.

(*n*) Crofts v. Middleton, 8 De G. M. & G., 192, particularly 212, 219, overruling S. C., 2 K. & J., 194.

(*o*) Franks v. Bollans, L. R. 3 Ch., 717. An appeal to the House of Lords appears to have been compromised, L. R. 13 Eq., 301.

(*p*) Nicholl v. Jones, L. R. 3 Eq., 696

(*q*) Vansittart v. Vansittart, 4 K. & J., 62, 70 (S. C., on appeal, 2 De G. & J., 249); Nicholl v. Jones, L. R. 3 Eq., 696; Gibbs v. Harding, Id. 5 Ch., 336.

(*r*) 1 Dow, 235.

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[1] *Where the wife refuses to unite in the conveyance.*] In a case where the wife does not join the deed, and does not, in any other manner, release her dower right—held, that the measure of damages is the difference, if there be any, between the contract price and the proved value of the property at the time of the breach. Bush v. Cole, 28 N. Y., 261; Pumpelly v. Phelps, 40 id., 59; Heimburgh v. Ismay, 35 N. Y. Supr. Ct., 35.

Rule for computing the present value of wife's dower right.] "The proper rule for computing the present value of the wife's contingent right of dower during the life of the husband, is to ascertain the present value of an annuity for her life, equal to the interest in the third of the proceeds of the estate to which her contingent right of dower attaches, and then to deduct from the present value of the annuity for her life, the value of a similar annuity depending upon the joint lives of herself and her husband; and the difference between these two sums will be the present value of her contingent right of dower." Walworth, Ch., in Jackson v. Edwards, 7 Paige, Ch., 408; see, also, Troutman v. Gouring, 16 Iowa, 415; Hazebig v. Hutson, 18 Ind., 481.

is believed that with that single exception there is no reported case in which the exception stated by Lord Hatherley has ever been acted upon; the extent to which it is to be carried seems to require ample consideration.

§ **260**. Where a married woman is a trustee (or one of several trustees) for sale, she cannot by contract bind herself to convey the estate.(*s*)

§ **261**. Lunatics are under an incapacity to contract, except during lucid intervals, during which times contracts entered into by them are as binding as if made by a person of perfectly sound mind.(*t*)[1] Where a person who has entered into a contract is subsequently found lunatic from a date prior to the contract, it is competent for the other party to bring his action for specific performance, and obtain a decision of the questions whether the defendant was a lunatic at the time of the contract, and, if so, whether he had lucid intervals, and whether the contract was executed during a lucid interval;(*u*) or he may ask, in the alterna-

(*s*) Avery v. Griffin, L. R. 6 Eq., 606.

(*t*) Hall v. Warren, 9 Ves., 605. As to the evidence required to prove a lucid interval, see Att.-Gen. v. Parnther, 3 Bro. C. C., 441; ex parte Holyland, 11 Ves., 10. See, also, Ray's Medical Jurisprudence and Insanity, ch. 14; Bucknill and Tuke's Psychological Medicine (3d ed.), 27, where many authorities are cited.

(*u*) Hall v. Warren, 9 Ves., 605; Jud. Act, 1873, § 29; Orders XXVI, XXXVI.

[1] Therefore, where a person subject to temporary insanity, in a lucid interval sold property for a full price, for the payment of urgent debts, his friends advising and consenting to the sale, it was held that such sale should not be set aside. Jones v. Perkins, 5 B. Monr., 222. A deed by a lunatic is voidable, and not void. Breckenridge v. Ormsby, 1 J. J. Marsh., 236. And where a person has contracted with a lunatic in good faith, and without notice of the lunacy, equity will not rescind the contract, restoring to such person the benefit derived from the contract by the lunatic's estate. Carr v. Halliday, 1 Dev. & Bat. Ch., 344. It is said, in Breckenridge v. Ormsby, supra, that although a lunatic may not be permitted to disaffirm a deed made by him under mental disability, yet the purchaser from the lunatic vendor, after his recovery of sanity, will have as much right to avoid the first deed as the vendor or his heir had. In Cates v. Woodson, 2 Dana, 452, where a lunatic conveyed a lot of land to A., and afterwards, when sane, conveyed the same to another person, it was held that although the first deed was not absolutely void, yet the second grantee might avoid it. Among those who are incapacitated to contract are habitual drunkards. They are, during their intoxication, considered as lunatics. But their drunkenness must be so complete as to deprive them of the proper exercise of their minds, and thus withhold the unqualified and perfect assent which equity requires for the validity of a contract. See Harrison v. Lemon, 2 Blackf., 51. So in Belcher v. Belcher, 10 Yerg., 121, the fact that the party was intoxicated when he executed the conveyance, no undue advantage being taken of his situation, and it appearing that he was capable of transacting business at the time, was thought to constitute insufficient grounds for setting aside the sale. And in Harrison v. Lemon, supra, it is added that unless it appears that there was unfairness in the transaction, or that the drunkenness was produced by the procurement of the grantee, the court will not, upon the opinion of one witness that the grantor was incapacitated by drunkenness for negotiating, avoid his deed.

tive, to have the contract either performed or discharged; and in the latter case the court will allow him, if vendor, to retain out of the deposit his costs, charges and expenses.(*v*) In judging of insanity, courts of equity are governed by the same principles as purely common law courts.(*w*)

§ **262**. The subsequent lunacy of a party to a contract in nowise affects the rights of the other parties;(*x*) and the difficulties which formerly stood in the way of their remedies were removed by the trustee acts of 1850 and 1852, and the lunacy regulation act, 1853, § 122.(*y*)

§ **263**. In addition to the legal incapacities to contract, courts of equity consider trustees, guardians, agents, and other persons standing in a confidential relation to others to be incapable (either absolutely or except under certain restrictions) of contracting for the purchase of the property entrusted to them in behalf of the persons to whom they stand thus confidentially related, and, under many circumstances, of contracting with such persons;(*z*) and this incapacity may, of course, be urged in an action for specific performance. But inasmuch as it depends on the general doctrines of the court with regard to each of these particular relations—and questions of this sort are more often agitated in actions to set aside the impugned transaction, than in proceedings for specific performance—it does not appear necessary to do more here than allude to the subject generally.(*a*)

(*v*) Frost v. Beavan, 17 Jur., 369. As to setting aside a contract for the lunacy of a party, see Neill v. Morley, 9 Ves., 478.

(*w*) Per Lord Hardwicke in Bennet v. Vade, 2 Atk., 327; Osmond v. Fitzroy, 3 P. Wms., 129. See infra, § 380.

(*x*) Owen v Davies, 1 Ves. Sen., 82.

(*y*) See Seton, 517 et seq.

(*z*) See Flanagan v. Great Western Railway Co., L. R. 7 Eq., 116.

(*a*) As to infancy, see infra, § 441.

CHAPTER II.

OF THE NON-CONCLUSION OF THE CONTRACT.

§ **264**. No proceedings in specific performance can, of course, be had unless a contract has actually been concluded, *i. e.*, unless two persons have agreed on the same terms, and mutually signified their assent to them. If what passed between them was but treaty or negotiation, or an expectation of contract, or an arrangement between them of an honorary nature, no specific performance can be had.[1]

§ **265**. The burden of proving this concluded contract is, of course, on the plaintiff; and it must be considered quite independently of the evidence of the contract (whether as affected by statute law or otherwise.(*a*) It must be admitted that the question of the existence of the contract and of its evidence are often mingled in discussion; but they should be kept separate in thought.

§ **266**. Where there is nothing to throw light upon the existence or non-existence of a contract but some instrument or instruments, the question is really one of construction of the documents in question.

§ **267**. Where the contract is embodied in a formal document simultaneously entered into by both parties, and purporting to be a contract, little difficulty can occur as to whether the contract was concluded. But where this is not the case questions have arisen.

§ **268**. One question has been whether the instrument in question was the embodiment of a contract or of some other transaction.

(1) Is a judge's order made by consent, and directing certain things to be done by the parties to it, a contract to do the things? It has been said not to be by Lord Hatherley

(*a*) Rossiter v. Miller, 3 App. C., 1124, 1151; Chinnock v. Marchioness of Ely, 4 De G. J. & S., 638.

[1] Or if a contract be formal and complete, yet, if understood by the parties as a jest, it is not binding. Armstrong v. McGhee, Addis, 261.

(when a vice chancellor), who, both on that ground and on the nature of the judge's order, refused specific performance.(*b*) The opposite view has been taken in some cases at common law, and it has been said that a contract is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of a judge.(*c*)[1]

(2) Are instructions for a settlement a contract for a settlement, or only instructions for a contract? This was a question on which the House of Lords was in one case much divided.(*d*)

(3) Are articles of association a contract between the company and a third person named in them? This is a question which, under special circumstances, has been answered in the affirmative.(*e*)

(4) Is the recital in a deed evidence of a contract?—is a question which also has been answered in the affirmative.(*f*)

§ **269**. A much more common question is whether negotiations have passed from that state and resulted in actual contract.[1] If it were only doubtful whether the contract was concluded or negotiations still remained open, the court of chancery used to refuse specific performance, and leave the parties to their common law rights if any.(*g*)[2]

§ **270**. A binding contract, enforceable in equity, may be constituted by the proposal of one party and the acceptance of the other.(*h*) But as the proposal has no validity with-

(*b*) Thames Ironworks Co. v. Patent Derrick Co., 1 J & H, 93.

(*c*) Wentworth v. Bullen, 9 B. & C., 840; Lievesley v. Gilmore, L. R. 1 C. P., 570. See, also, Tatham v. Platt, 9 Ha., 660.

(*d*) Caton v. Caton, L. R. 2 H. L., 127.

(*e*) Touche v. Metropolitan Railway Warehousing Co., L. R. 6 Ch., 671.

(*f*) Wilson v. Keating, 27 Beav., 121; aff'd 4 De G. & J., 588

(*g*) Huddleston v. Briscoe, 11 Ves, 583, 591; Stratford v. Bosworth, 2 V. & B., 341; Skelton v. Cole, 1 De G. & J., 587.

(*h*) The acceptance must be by the other party. An offer by A. to B. and acceptance by C. constitutes no contract. Meynell v. Surtees, 3 Sm. & Gif., 101, 117.

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[1] A party wrote to the owner of land inquiring the price. Held, that the reply of the latter stating the price, does not constitute a proposition to sell. Knight v. Cooley, 34 Iowa, 218; Erwin v. Erwin, 25 Ala., 236. Construction of the word *immediately*. Bruner v. Wheaton, 46 Mo., 363.

Rule as to acceptance of terms.] In order that an acceptance may be binding, it must be distinct, unconditional; it must not vary the terms of the offer, and it must be communicated without unreasonable delay. Thomburry v. Bevill, 1 Y. & C. C. C., 554; Eads v Carondolet, 42 Mo., 113; Bruner v. Wheaton, 46 id., 363; Bethel v. Hawkins, 21 La. An., 620; Wilson v. Clements, 3 Mass., 1; Peru v. Turner, 10 Me., 185; Johnson v. Fisher, 7 Watts, 48; Hazard v. New England Mar. Ins. Co., 1 Sumn., 218; Carr v. Duval, 14 Pet., 77; Hartford and New Haven R. R. Co. v. Jackson, 24 Conn., 514; Solomon v. Webster, 4 Colorado, 353; Carter v. Shorter, 37 Ala., 253.

[2] Carr v. Duval, 14 Pet., 77.

out the acceptance, a memorandum of offer differs essentially from a memorandum of agreement. "In the case of an offer, no doubt, the party signing it may at any time before acceptance retract; but if it be an agreement, though signed by one party alone, he cannot retract at his pleasure, but all he can do is to call upon the other party to sign or rescind the agreement. A memorandum of agreement supposes that the two parties have verbally made an actual contract with each other; and when the terms of such contract are reduced into writing and signed, that is sufficient to bind the party signing; but if the memorandum is of an offer only, that assumes that there has been no actual contract between the parties."[1]

§ **271**. In order that an acceptance may be operative, it must be plain, unequivocal, unconditional and without variance of any sort between it and the proposal, and it must be communicated to the other party, and that without unreasonable delay.(*j*)

§ **272**. The proposition that the acceptance must be plain, unequivocal, unconditional and without variance, is supported and illustrated by a great variety of decisions. In the case of Kennedy v. Lee,(*k*) the subject was much discussed; it was there unsuccessfully argued that the acceptance introduced a term respecting the good-will of a business not included in the proposal.

§ **273**. The unequivocal character of the acceptance that is requisite is well illustrated by a case in which A. made an

(*i*) Per Kindersley, V. C., in Warner v. Willington, 3 Drew., 531. See, also, Mevnell v. Surtees (on appeal), 1 Jur. (N. S.), 737; 3 W. R., 535; Horsfall v. Garnett, 6 id., 387. The distinction is the same between a *pollicitatio* and a contract in the Roman law. See Pothier, Traite des Oblig., part 1, ch. 1, s. 1, art 1, § 2.

(*j*) Oriental Inland Steam Navigation Co. (limited) v. Briggs, 4 De G. F. & J., 191.

(*k*) 3 Mer., 441. See, too, Thornbury v. Bevill, 1 Y. & C. C. C., 554; Cayley v. Walpole, 18 W. R., 782.

[1] In the case of the Canal Co. v. Railroad Co., 4 Gill & J., 1, a contract, valid and binding at law, is defined to be a mutual consent of the parties concerned, respecting some property or right that is the object of the stipulation, or something that is to be done or forborne; a transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised or disputed by the other; and any words manifesting a *congregatio mentium*, are sufficient to constitute a contract. But this mutual consent—the *congregatio mentium*—cannot, of course, be attained without the assent of both parties. Therefore, if A. sign a writing that he will sell B. a house on certain terms, it is a mere proposition, and not an agreement, unless accepted by B. Tucker v. Wood, 12 John., 170. Nor is a paper, filed in a cause by one party, offering to be bound by certain terms, if the verdict should be in his favor, but not accepted by the other party, binding on the party who filed it. Bower v. Blessing, 1 S. & R., 243.

offer to B., by letter, to sell a lot of land; B. filed a bill against A., alleging a contract in writing for the sale of this estate, and the answer offered to sell the estate; the decree was in the alternative for a conveyance on the payment of the purchase money into the bank, or in default for the dismissal of the bill; the money was paid. The question arose between the heirs and devisees of B. as to the time when the contract became binding; it was held that the bill did not amount to an acceptance so as to bind B.; for he as plaintiff might have dismissed his bill; the decree did not, for it left an election to the plaintiff; but the payment of the money into the bank did, for that was unequivocal.(*l*) In another case, where the plaintiff had made an offer to take a farm, and had referred to certain persons as to his capabilities and capital, and in consequence of this offer the agents of the proposed lessor had, by his direction, prepared and sent to the proposed lessee a lease which they considered to be in pursuance of the proposal; Kindersley, V. C., held this not to be an acceptance,(*m*) on the ground that the act was ambiguous and conditional—ambiguous, because the lease might have been sent in order to save time, and without any intention of departing from the right of accepting or refusing the offer of the plaintiff, according to the result of his communication with the referees; and conditional, because the sending the draft lease, if an acceptance at all, was an acceptance upon condition that the defendant accepted the draft lease. The case of Thomas v. Blackman,(*n*) before Knight Bruce, V. C., may also be referred to as illustrating this doctrine. Here there had been a long correspondence, and the vice chancellor held that there never had been, in any part of it, a clear accession on both sides to one and the same set of terms; and accordingly he decreed the dismissal of the bill, unless the plaintiff accepted the terms of the defendant's original offer, which the plaintiff acceded to.[1]

(*l*) Gaskarth v. Lord Lowther, 12 Ves., 107. Cf. Horsfall v. Garnett, 6 W. R., 387.
(*m* Warner v. Willington, 3 Drew., 523. (*n*) 1 Coll., 301.

[1] The assent must be to the same subject matter, and in the same sense that is offered. Hazard v. New England Mar. Ins. Co., 1 Sumner, 218. And the proposition must be accepted according to its terms; any qualification of, or departure from, them invalidates the offer, unless afterwards agreed to by the person making it. Carr v. Duval, 14 Pet., 77. Thus in Peltier v. Collins, 3

§ **274**. In illustration of the unconditional nature of the acceptance required, the case of Crossley v. Maycock (*o*) may be referred to. There vendors wrote, in answer to an offer, "which offer we accept, and now hand you two copies of conditions of sale," and inclosed a form of contract con-

(*o*) L. R. 18 Eq., 180. See, too, Lewis v. Brass, 26 W. R., 152.

Wend., 459, it is said that there is no contract, if there be a material difference between the note of the bargain delivered by a broker to a vendee and that delivered to the vendor. In Corning v. Colt, 5 Wend., 253, where manufacturers in the country sent an order to merchants in the city for a quantity of plough castings, to be *forwarded by canal*, only a part of which were forwarded, and those by land carriage, by means whereof the expense of transportation was increased; it was held, in an action for the price of the property forwarded, that the plaintiffs were not entitled to recover without showing an acceptance of the goods by the defendants It is said in Firth v. Lawrence, 1 Paige, 434, that a conditional acceptance of an offer by letter, never assented to by the party making the offer, is not binding upon either party; and the party having once declined the offer as proposed, cannot, by any subsequent assent, ratify such original offer. The rigidity of the rule was displayed in the case of Eliason v. Henshaw, 4 Wheat., 225. In this case A. offered to purchase of B. two or three hundred barrels of flour, to be delivered at Georgetown by the first water, and to pay for the same a stated price; and, to the letter containing the offer, required an answer by the return of the wagon by which the letter was sent. This wagon was at the time in the service of B., and employed by him in conveying flour from his mill to Harper's Ferry, near which place A. then was. His offer was accepted by B in a letter sent by the first regular mail to Georgetown, *and received by A. at that place;* but no answer was sent to Harper's Ferry. Held, that this acceptance, communicated at a place different from that indicated by A., imposed no obligation binding upon him. See Glaymaker v. Sawin, 4 Whart., 369. The principle upon which these cases proceed is, that no person shall be held upon the terms of a contract which he has never made, nor even intended to impose upon himself. And therefore if one party does not accede to a promise as made, the other party is not bound by it. Tuttle v. Love, 7 John., 470; Bruce v. Pearson, 3 id., 534. And where R. agreed to pay for a quantity of hay, provided L. should pronounce it merchantable, and L. pronounced it "a fair lot, say merchantable, not quite so good as I expected; the outside of bundles somewhat damaged by the weather." Held, that R. was not bound. Crane v. Roberts, 5 Greenl, 419. Where a contract is made by a broker, and no sale-note is delivered, and the entry by him made in his sale-book varies from the contract as actually concluded, neither party is bound, inasmuch as no note or memorandum of the *contract* has been reduced to writing. Thus, when a contract is made for a quantity of iron expected from abroad, and the purchaser stipulates for *six months' credit*, and for the arrival of the iron in a *reasonable time*, and the broker omits to make an entry of those conditions, the *vendors* are not bound, although the conditions primarily were for the benefit of the *purchaser*, and he elects to waive them. Davis v. Shields, 26 Wend., 341; see Hutchinson v. Boker, 5 M. & W., 535; Brodie v. St. Paul, 1 Ves., 326; Gordon v. Norton, 4 M. & W., 155. But where the parties agree upon the terms of a contract it is binding upon them, though their understanding of the terms be not precisely the same; as where one party understood a particular installment to bear interest, while the other party did not so understand it Neufeille v. Stuart, 1 Hill Ch., 109. But this rule is to be applied in a limited sense; and if there has occurred any error or mistake in reference to the obligations which the contract entails, the case will be otherwise. Thus, in the case of the Hartford and New Haven Railroad Company v. Jackson, 24 Conn, 514, it was said that where an application made by the defendant to the agent of a railroad company, to know at what price he would carry 50,000 laths to a specified place, the agent inquired how many bundles that

taining sundry special stipulations; and it was held that the acceptance was conditional only. "If," said Jessel, M. R.,(*p*) "there is a simple acceptance of an offer to purchase, accompanied by a statement that the acceptor desires that the arrangement should be put into some more formal terms, the mere reference to such a proposal will not prevent the court from enforcing the final agreement so arrived at. But if the agreement is made subject to certain conditions then specified or to be specified by the party making it, or by his solicitor, then, until those conditions are accepted, there is no final agreement such as the court will enforce."

§ **275** Where there is any variance between the terms of the proposal and those of the acceptance, no contract arises; as where A. offered to purchase a house on certain terms, possession to be given on or before the 25th of July, and B. agreed to the terms, and said he would give possession on the 1st of August.(*q*) And where A. made the promoters of a railway an offer of a way-leave for the purpose of their railway, which was one for mineral traffic only, and it was subsequently accepted, but for the purpose of constructing a public railway for general traffic, this was held to be such a variation in the subject-matter as prevented any contract from arising.(*r*)

§ **276**. The introduction of a term in the acceptance which is not in the proposal is a variance which prevents their constituting a contract. Therefore, where the defendant offered certain terms for a lease, and the plaintiff accepted the terms and offered an under-lease, there was held

(*p*) L. R. 18 Eq., 181.
(*q*) Routledge v. Grant, 4 Bing., 653; affirmed by Lord Cranworth, 1 Jur. (N. S.), 737, 3 W. R., 535, sanctioning this argument.
(*r*) Meynell v. Surtees, 3 Sm. & Gif., 101;

would make, and a companion of the defendant, to whom the inquiry was referred, replied 500; but the agent understood him to say 100, and thereupon gave the defendant the price for carrying 100 bundles, instead of 500 bundles, which he agreed to pay; and the railroad company having carried 500 bundles, sued the defendant for carrying them at the usual rates, the court held that the plaintiffs were not bound by the transaction. Where letters passing between tenants in common of real estate are mere proposals from one to another of sale, and a sale accordingly is made, which is ratified by the parties by signing deeds, it is too late to object that the terms of the first agreement have not been complied with as agreed. Hunt v. Johnston, 24 Miss. (3 Jones), 509. As to the distinction between propositions, the acceptance of which amounts to a valid contract, and proposals to render a gratuitous kindness, which are not designed to create legal obligations on the parties. See Erwin v. Erwin, 25 Ala., 236.

to be no contract.(*s*) So where a condition was introduced into the acceptance, it prevented its operating as a contract.(*t*) In another case, where the plaintiff proposed a contract to the defendant, stipulating, among other things, that a lease should contain all the covenants in the superior lease, and the defendant signed the contract tendered, but with the qualification that there was nothing unusual in such superior lease: a draft of the proposed lease was then submitted to the defendant, who made some alterations, and requested the plaintiff's solicitors to adopt them at once, or to refuse the lease: the solicitors sent back the draft, acceding to all the alterations except one as to assigning without license; it was held that at this stage there was no contract, and that the proposed lessee could determine the treaty.(*u*) And where a proposal was made to take an allotment of railway shares, and a letter was returned accepting the offer, but headed "not transferable," the new term introduced by these words prevented the proposal and acceptance from constituting a contract.(*v*)

§ **277**. In a case which went to the House of Lords,(*w*) the court of appeal held that the purchaser's acceptance of a proposal for sale, "subject to the title being approved by our solicitors," did not constitute a contract by reason of the new term; for all that the simple acceptance could have given here would have been the right to a good title, and what he stipulated for was a title to be approved by particular persons of his own selection. But in the House of Lords, though the decision of the court of appeal was affirmed (on the ground that no concluded contract had been established), Lord Cairns dissented from that court's view of the effect of the words in question, and said,(*x*) "I am disposed to look upon the words as meaning nothing more than a guard against its being supposed that the title was to be accepted without investigation, as meaning, in fact, the title must be investigated and approved of in the usual way, which would be by the solicitor of the purchaser."

§ **278**. But where the proposal leaves a term to be de-

(*s*) Holland v. Eyre, 2 S. & S., 194.
(*t*) Hall v. Hall, 12 Beav., 414.
(*u*) Lucas v. James, 3 Ha., 440. Cf. Wright v. St. George, 12 Ir. Ch. R., 226.
(*v*) Duke v. Andrews, 2 Ex., 290.
(*w*) Hussey v. Horne-Payne, 8 Ch. D., 670; 4 App. C., 311; Hudson v. Buck, 7 Ch. D., 683.
(*x*) 4 App. C., 322.

cided by the acceptance, the decision of this will not, of course, amount to the introduction of a new term; as, *e. g.*, where the proposal has reference to such a day as shall be named by the party to whom it is made, and he in accepting names the day.(*y*) And a contract by proposal and acceptance may, like any other, leave the price or any other term to be ascertained in a way agreed on.(*z*)

§ **279**. So, again, it seems clear that a variation which is purely nugatory will not affect the contract;(*a*) nor will the introduction into the acceptance of what is not matter of contract: as, *e. g.*, the words, "we hope to give you possession at half-quarter day," which were held to be a mere expression of hope, and so not to introduce a new term into the acceptance.(*b*)[1]

§ **280**. Nor will the court consider a new term to be introduced by the circumstance that the acceptance proceeds to treat of the way in which the contract is to be carried into execution; as, for instance, by referring to a formal contract that was to be drawn.(*c*)

§ **281**. Nor will a new term be held to be introduced by the mere grant of some indulgence by the acceptor to the proposer; as where the proposal involved the payment on a particular day, and the acceptance added that, if the payment was not so made, interest at ten per cent must also be paid.(*d*) It would seem that this could only apply where the time of payment would be of the essence of the contract, as in any other case it would seem that such a stipulation was not an indulgence.

(*y*) Boys v. Ayerst, 6 Mad., 316.
(*z*) Walker v. Eastern Counties Railway Co., 6 Ha., 594.
(*a*) Lucas v. James, 3 Ha., 410, 424 Cf infra, § 610, and per Lord Colonsay in Proprietors, etc., of English and Foreign Credit Co. v. Arduin, L. R. 5 H. L., 64, 81–2.
(*b*) Clive v. Beaumont, 1 De G. & Sm., 397. See, also, Johnson v. King, 2 Bing., 270.
(*c*) Gibbins v. North Eastern Metropolitan Asylum District, 11 Beav., 1; Skinner v. M'Douall, 2 De G. & Sm., 265; Bonnewell v. Jenkins, 8 Ch. D., 70; Rossiter v. Miller, 3 App. C., 1124; and see infra, § 490.
(*d*) Harris' Case, L. R. 7 Ch., 587.

[1] Thus, A. wishing to purchase certain lands, wrote to the owner, B., inquiring his terms by the acre, and stating the payments which it would be convenient for him to make, among which was one of $1,000 immediately. B. answered, stating his price, but that he wished A. to take the responsibility of establishing the boundaries, and acceded to the terms of payment offered, and requiring A.'s answer as soon as possible. A. replied that he would take the land on the terms proposed, and would have the lines ascertained; though his letter also expressed a wish that the agent of B. would attend to the fixing of the line on one side, on account of feelings of delicacy on A.'s part, in respect to the conterminous tenants on that side, but not waiving or abandoning his acceptance of the offer. Held, that the contract of sale was complete. Fitzhugh v. Jones, 6 Munf., 83.

§ **282**. The acceptance must be communicated in some way by the accepting party to the other; a mere mental acceptance will not do. "The plea is not good," said Brian, C. J., "without showing that he certified the other of his pleasure, for it is common learning that the intent of a man is not triable—for even the devil does not know the intent of a man.(*e*)

§ **283**. The acceptance, moreover, must be without unreasonable delay. "When I offer anything to a person," said Lord Cranworth,(*f*) "what I mean is, I will do that if you choose to assent to it; meaning, although, it is not so expressed, if you choose to assent to it within a reasonable time." This principle is illustrated by the case of Williams v. Williams,(*g*) of which the circumstances were, that in 1817 A. wrote to B. that he had credited B.'s account with £220 in consideration of a contract by B. to convey certain houses. The abstract was delivered; but there was no acceptance in writing by B., who, however, five years afterwards filed his bill against A. for specific performance. It appeared that in 1827 A. had abandoned the treaty, and that in 1829 both parties considered it as broken off, but nevertheless that B. had, in the meantime, had the benefit of the credit of £220. The court dismissed the bill on the ground that an offer to convert it into a contract must be accepted and acted on within a reasonable space of time.[1]

(*e*) Year Book, 17 Edw. IV, T. Pasch., 2, referred to by Lord Blackburn in Brogden v. Metropolitan Railway Co., 2 App. C., 692.

(*f*) In Meynell v. Surtees, 1 Jur. (N. S.), 737; 3 W. R., 535.

(*g*) 17 Beav., 213.

[1] Acceptance within a reasonable time is as definite a rule as can well be laid down. Beckweth v. Cheever, 1 Foster, 41: Peru v. Turner, 1 Fairf., 185. As to what constitutes reasonable time must be determined by the circumstances of each case; and it has been said that "if the party addressed goes away and returns the next week, or the next month, and says that he will accept the proposition, he is too late, unless the proposer assents in his turn. So it would be, probably, if he came the next day or the next hour; or, perhaps, if he went away at all and returned." 1 Pars. on Contr., 404. In the case of Peru v. Turner, 1 Fairf., 185, the town of P., by vote, agreed to accept of a pauper, as an inhabitant, on condition that the town of T. would relinquish all demands against the former town. Nearly six years afterward the town of T. accepted the proposition, and tendered to the town of P. a note, that being the only demand it held against that town. This was held to be an unreasonable delay, and that the tender was wholly inoperative to revive the proposal and to render it binding on the town of P. And, again, in Wilson v. Clements, 3 Mass., 1, A. and B. having an open account, an adjustment takes place between A. and an agent of B duly authorized, and the balance found due is paid over to the agent B. expresses dissatisfaction, whereupon A. writes to B.: "Re-peruse the accounts, make out a statement according to your wishes, and draw on me for the balance, which shall be punctually honored." Two years afterwards,

In another case A. applied to a company for shares on the 8th of June, and an allotment was made on the following 23d of November, and it was held that the acceptance of the proposal to take shares came too late to bind the proposer.(*h*)

§ **284**. The proposal, before conversion into a contract by acceptance, may be determined in two ways—by the withdrawal of the person making the offer, or by the refusal of the person to whom it is made.

§ **285**. First, it may be determined by the proposer by withdrawal before acceptance,(*i*) because the proposal by itself creates no mutuality and no obligation; so that where a person made an offer for a farm, which the owner intended to accept, but did not do so bindingly, and the proposer subsequently withdrew his offer, it was held that he could do so, and that there was no contract.(*j*) And so, also, where A., by writing, applied to a company for shares, "which he thereby accepted" and paid the deposit, but before allotment withdrew his application and unsuccessfully required the return of his deposit, and an allotment was made to him, he was held not to be a contributory.(*k*) And where a railway company gave notice to treat for part of a manufactory, which was met by a counter-notice requiring them to take the whole, and the company then gave notice of their intention to apply to the board of trade for the appointment of a surveyor to determine the value of the premises required by the notice to treat and of the further lands which the owner could lawfully require and

(*h*) Ramsgate Victoria Hotel Co (limited) v. Montefiore, L. R. 1 Ex., 109.

(*i*) Thornbury v. Bevill, 1 Y. & C. C. C., 554. See, also, Meynell v. Surtees, 1 Jur. (N. S.), 737; 3 W. R., 535; Horsfall v. Garnett, 6 id., 387; and cf. (as to the right of a vendor at an auction to withdraw the property at any time before the hammer falls) Warlow v. Harrison, 28 L. J. Q. B., 18.

(*j*) Warner v. Willington, 3 Drew., 523; cf. Rummens v. Robins, 4 De G. J. & S., 88

(*k*) Ex parte Graham, 30 L. J. Bank., 42.

B. being pressed by a creditor, draws a bill on A. in favor of the creditor. It was held that A. was not bound to accept or pay a bill so drawn. It seems, also, that where a merchant receiving goods on consignment, under an offer of sale, after he had ascertained the value of the goods by actual sale of a large part of them as factor, and, twelve days after the receipt of the goods, assented to the offer of the consignor, such assent will not be binding upon the consignor. In the case of Mactier v. Frith, 6 Wend., 103, it is said that a willingness to enter into the agreement by the party offering, is presumed to continue for the time limited; and if that time be not limited by the author, then until it is expressly revoked or countervailed by a contrary presumption. But these remarks, though applicable to the case then under consideration, it seems, are evidently not intended to be construed in their broadest interpretation.

had required the company to take; it was held that the company might still withdraw their notice to treat.(*l*)

§ **286**. This right to retract is not affected by the fact that the offer itself specifies a time within which the acceptance is to be made; so that where A. offered to sell a house to B., and gave B. six weeks for a definite answer, A. was held entitled to withdraw his offer before the expiration of that period.(*m*)[1]

§ **287**. Further, it is not necessary to the effectual determination of a proposal by withdrawal before acceptance that any formal or express notice of withdrawal or retractation should be given to the person to whom the proposal was made.(*n*) "It may well be that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed;"(*o*) but as soon as the person to whom the offer was made in fact has this knowledge, as, for instance, by knowing that the proposer has sold the property to a third person, he will be taken to have sufficient notice of withdrawal, and he cannot afterwards, by accepting the offer, make a binding contract.(*o*)

§ **288**. Where however the communication is not a mere offer to contract but a notice given in pursuance of a right of pre-emption, the notice may, according to the terms of the instrument giving this pre-emption, be incapable of being withdrawn.(*p*)

§ **289**. In the second place, the refusal of the person

(*l*) Grierson v. Cheshire Lines' Committee, L. R. 19 Eq., 83.

(*m*) Routledge v. Grant, 4 Bing., 653; Cooke v. Oxley, 3 T. R., 653. Cf. Dickenson v. Dodds, 2 Ch D., 463.

(*n*) Dickenson v. Dodds, 2 Ch. D., 463, 474.

(*o*) Per James, L. J., 2 Ch D., 472. Cf. Stevenson v. McLean, 5 Q. B. D., 346; Guillamore v. Peacocke, 12 Ir. Ch. R., 360.

(*p*) See Homfray v. Fothergill, L. R. 1 Eq., 567.

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[1] If an offer is made, and instantly recalled, before acceptance, "although the other party was prepared to accept it the next, the offer is effectually withdrawn.' Pars. Contr., vol. 1, p. 405; Mactier v. Frith, 6 Wend., 103. It is said, in The Palo Alto, Daveis, 344, that in all engagements formed *inter absentes* by letters or messengers, an offer by one party is made, at law, at the time when it is received by the other. Before it is received, it may be revoked. So the revocation in law is made when it is received, and not before. If the party to whom the offer is made accepts and acts on the offer, the engagement will be binding on both parties, though, before it is accepted, another letter or messenger may have been dispatched to revoke it.

to whom the proposal is made puts an end to it; and it will not be revived by a subsequent tender of acceptance.(*q*)[1]

§ **290**. As it is competent to the proposer to recall his proposal at any time before acceptance, so also he may vary it by the introduction of any new term into it. And as the person to whom the proposal is made may, of course, offer to accept the terms proposed with any variation or addition, it follows that each party may continue to add fresh stipulations to the proposed contract, until the terms proposed by one side have been definitely accepted by the other.(*r*) Therefore, where the owner of an estate made a proposal

(*q*) Hyde v. Wrench, 3 Beav., 334. The decision in Hodgson v. Hutchenson, 5 Vin., Abr., 522, pl. 34, which inferred an acceptance from acts after an explicit refusal, probably cannot be maintained on this point

(*r*) Honeyman v. Marryat, 21 Beav., 14, affirmed in D. P. 6 H. L. C., 112. Distinguish Jolliffe v. Blumberg, 18 W. R., 784.

[1] In the case of Boston and Maine Railroad v. Bartlett, 3 Cush., 224, there was a proposition to sell land at a stated price, the answer to be given in thirty days. Fletcher, J., in delivering the opinion of the court, held, that though this offer was a continuing one, "during the whole of that time it was an offer every instant," yet, that it might be revoked at any time before acceptance. But if unrevoked at the time of acceptance, it become a valid and binding contract. See, also, Pars. Contr., 404 and 405; Foster v. Boston, 22 Pick., 33, is an interesting case decided on the same point. The case was this: In March, an offer was made to the city of Boston, by several memorialists, to relinquish their interest in the land which would be required to lay out a certain street, provided it should be opened within the year. In April the city voted to appropriate a certain sum for that year, to be paid to the memorialists in full for all expenses and damages when the street should be completed. In June, two of the memorialists sent a letter to their associates and the mayor, explaining their offer to be to relinquish all damages for the land, but not the expense of removing the buildings, etc. In October, the city passed an order to lay out the street, and it was done within the year. Soon after the passing of this order, the said two memorialists protested against the laying out such street, and said that they should claim damages, and accordingly made complaint. It was held that the offer was a continuing one for the year, if not revoked or rejected; that the vote of April was not a rejection, but a distinct proposition; and that, by passing the order the city accepted the offer as explained by the complainants, and that it then became a binding contract, and that the offer was several in its operation, and not joint. It is, in all cases, the final assent, the positive and unqualified acceptance of the one party, that renders the offer obligatory upon the party making it. And, therefore, when an engagement is made by a party to decide, on the happening of a particular event, whether to accept an offer of a contract of sale, the contract is not completed on the happening of the event, until the decision is made. Mactier v. Frith, 6 Wend., 103. In reference to an alleged want of consideration, in contracts of this kind, Fletcher, J., in the case of the Boston and Maine Railroad v. Bartlett, cited above, says: "The acceptance by the plaintiffs constituted a sufficient legal consideration for the engagement on the part of the defendants. It was precisely as if the parties had met at the time of the acceptance, and the offer had then been made and accepted at once." It seems to be clear that these cases are no more invalidated for want of consideration, than those where an instantaneous assent is given to the proposition offered. Pars. Contr., vol. 1, p. 406. Wright v. Bigg, 21 E. L. & E., 591; Frith v. Lawrence, 1 Paige, 434. Notice of refusal to accept is not necessary: it is sufficient if there is no evidence of acceptance; and whether there has been an acceptance or not, is a question for the jury. Corning v. Colt, 5 Wend., 253.

requiring amongst other things the payment of £1,500 by way of deposit, and the purchaser objected to it, and before he accepted the terms, the owner required it to be paid and the contract to be signed before a given day, or the treaty to be at an end, and this was not complied with, but a subsequent offer was made to sign the contract and pay the deposit; the court held that there was no contract.(*s*)[1]

§ **291**. The Statute of Frauds requiring that the memorandum of agreement shall be signed by the party to be charged therewith and not requiring the signature of both parties, it follows that where there is a writing under the hand of the defendant expressing the contract, there is no need to prove an acceptance in writing by the plaintiff of the terms of that contract, and the institution of the action is a sufficient acceptance.(*t*) If that writing leaves any term open to the election of the other party, the acceptance must, of course, be in writing to satisfy the statute.(*u*)[2]

§ **292**. But the cases have gone further, and it is now well settled that where the writing is a memorandum expressing not a contract but a mere proposal, yet there the acceptance of this proposal (though it seems essential to convert the proposal into a contract), need not be in writing. This was so decided by Kindersley, V. C., in a case where he observed on the want of previous authority distinctly to establish the point,(*v*) and his decision was subsequently followed by the courts of exchequer and exchequer cham-

(*s*) S. C.
(*t*) Boys v. Ayerst, 6 Mad., 316.
(*u*) Id.
(*v*) Warner v. Willington, 3 Drew, 523.

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[1] See Foster v. Boston, 22 Pick., 33.

[2] A writing signed by the party to be charged is sufficient within the statute of frauds. Hence, where the offer embraces the whole of the proposed agreement, so that a single assent only is required, a parol acceptance may be all that is needed to bind the party who makes the offer. Warner v. Willington, 3 Drew, 523; Coleman v. Upcot, 5 Vin. Abr., 527; Pl., 17; Palmer v Scott, 1 R. & M., 391; *contra*, Lane v. McLaughlin, 14 Minn., 72. A party made an offer, by letter, which was verbally rejected. Held, that the writer was released from his offer, unless he consent to renew the negotiation. Sheffield Canal Co. v. Sheffield R. R. Co., 3 R. R. Cas., 121. Where a party mentally concludes to accept an offer, but does nothing to indicate such acceptance—held, there was no binding contract. Firth v. Lawrence, 1 Paige's Ch., 434; White v. Corliss, 40 N. Y., 467.

Telegram] An offer may be made and accepted by telegraph that will be binding on both parties. Duble v. Batts, 38 Texas, 312; Wells v. Milwaukee R. R. Co., 30 Wis., 605.

ber.(*w*) In the old case of Coleman v. Upcot,(*x*) where there was first an acceptance by the plaintiff by parol, and subsequently a subscription by the plaintiff, the parol acceptance appears to have been the ground of the decision that there was a binding contract.

§ **293**. When it has been once established that the acceptance need not be in writing, it, of course, follows that it may be by acts as well as words.(*y*) Thus, for example, where an uncle of a young man sent proposals to the friends of a lady, to which no answer was returned, but the young man was admitted as a suitor, and the marriage ensued, it was held by Lord Nottingham to amount to a complete contract, which ought to be performed on all sides.(*z*) It is a matter of every day occurrence to infer assent from acts as well as from words.[1]

§ **294**. Of course no action can be brought against any one on a parol acceptance of a proposal.

§ **295**. In contracts constituted by proposal and acceptance, it is obvious that the question may arise, at what time the treaty was converted into a contract.(*a*) The contract is perfected by the posting of a letter declaring the acceptance, because thereby the acceptor has done all that is requisite on his part, and is not answerable for the casualties of the post-office.(*b*) Hence it follows that the contract dates from the posting, and not from the receipt of the letter of acceptance.(*c*) The current of authorities which establish these propositions was somewhat interrupted by two cases. One was that of The British and American Telegraph Co. (limited) v. Colson,(*d*) where the acceptance having never been received by the proposer it was held that there was no contract, and it was laid down that the contract is not completed till the acceptance is delivered to or brought to the knowledge of the proposer, unless this happen from

(*w*) Smith v. Neale, 2 C. B. (N. S.), 67; Reuss v. Picksley, L. R. 1 Ex., 342. See, also, Mozley v. Tinkler, 1 C. M. & R., 692; Liverpool Borough Bank v. Eccles, 4 H. & N., 139.

(*x*) 5 Vin. Abr., 527, pl. 17; cf. Palmer v. Scott, 1 R. & My., 391.

(*y*) Williams v. Williams, L. R. 2 Ch., 294.

(*z*) Parker v. Serjeant, Finch, 146.

(*a*) Cf. on this point, Dickenson v. Dodds, 2 Ch. D., 463; supra, § 287.

(*b*) Dunlop v. Higgins, 1 H. L. C., 381; Duncan v. Topham, 8 C. B., 225; Adams v. Lindsell, 1 B. & Al., 681; Stocken v. Collin, 7 M. & W., 515; Harris' Case, L. R. 7 Ch., 587.

(*c*) Potter v. Sanders, 6 Ha., 1; Byrne v. Van Tienhoven, 5 C. P. D., 344.

(*d*) L. R. 6 Ex., 108.

[1] *Parol contract fully performed.*] A parol contract for the exchange of lands, was clearly proved, and fully performed by the plaintiff. Held, that specific performance would be decreed. Armes v. Bigelow, 3 McArthur (D. C.), 442.

his own act or default. In the other case,(*e*) Malins, V. C., adopted the same view. But the authority of these cases is much shaken by the observations subsequently made on the former of them by James and Mellish, L. JJ.,(*f*) and by the expression of change of opinion by the learned vice chancellor.(*g*)

§ **296**. In case of there being an agent for the proposer, the communication of the acceptance to him completes the contract, though the agent may fail to make known the acceptance to his principal.(*h*)[1]

(*e*) Townsend's Case, L. R. 13 Eq., 148.
(*f*) Harris' Case, L. R. 7 Ch., 587.
(*g*) Wall's Case, L. R. 15 Eq , 18.
(*h*) Wright v. Bigg, 15 Beav., 592.

[1] An example of the full extent of this doctrine is afforded in Vassar v. Camp, 1 Kern. (N. Y.), 441; the principal of which is, without doubt, the law of the State of New York. A. proposed, by mail, a contract with B., the parties being distant from each other. B , accepting the contract, deposited his acceptance in the post-office, addressed, and to be forwarded to A. A. did not receive the acceptance. Held, that the contract was complete and binding. Mactier v. Frith, 6 Wend., 103, is a decision of much importance on this subject, and one which has, in a great measure, influenced the more recent decisions throughout the country. It was there held, that where a joint owner of a cargo of brandy ordered from France, and supposed to be at sea, wrote from St. Domingo to his co-owner, in New York, on the 24th of December, proposing that the latter should take the adventure solely on his own account, and he on the 17th, in answer to the proposition, said he would delay coming to a determination until he again heard from the party making the offer, and the owner in St. Domingo, on the 7th of March, acknowledged the receipt of the answer, saying he had noted its contents; and on the 28th of March, by another letter; confirmed the offer made in December, and the owner in New York, on the 25th of March, after the arrival of the brandy in port, wrote to the owner in St. Domingo, that he had decided to take the adventure to his own account, and had credited him with the invoice; that the offer to sell remained open, and that its acceptance on the 25th of March closed the bargain, notwithstanding that the letters of the 25th and 28th of March did not reach their destination until after the death of the party accepting, which happened on the 10th of April. Busbon v. Boyd, 4 Paige, 17, and Clark v. Dales, 20 Barb., 42 are authorities to the same effect. In Connecticut, New Hampshire, Pennsylvania, Georgia, Kentucky and Alabama, the courts have followed the decision of Mactier v. Frith, and the English case of Adams v. Lindsell; see Averill v. Hedge, 12 Conn., 424; Beckwith v. Cheever, 1 Foster, 41; Hamilton v. Lycoming Ins. Co., 5 Barr, 339; Levy v. Coke, 4 Geo., 1; Chiles v. Nelson, 7 Dana, 281; Falls v. Gaither, 9 Porter, 605. In Tennessee the rule is the reverse. Gillespie v. Edmunston, 11 Humph., 553; as it is likewise in Massachusetts. McCullough v. Eagle Ins. Co., 1 Pick., 278. The variance between the law of the latter State and that of the Supreme Court of the United States, is best illustrated by a comparison of the case of Tayloe v. Merchants' Fire Ins. Co., decided in that court, and the case of Thayer v. Middlesex Mutual Fire Ins. Co., found in 10 Pick., 326. In the former case, it was held, that in a correspondence to effect the insurance of a house, when the insurance company had made known their terms, and the other party had put a letter in the post-office accepting their terms, that the contract was complete; and the property having been destroyed by fire while the letter was still in transit, that the company were responsible. Thayer v. Middlesex Fire Ins. Co. was this: On the 15th of January, an application was made on behalf of the plaintiff, who lived at Hopkinton, to the defendants, an insurance company at Concord, for insurance upon the plaintiff's buildings. The defendants stated the terms on which they

§ **297**. One species of contract by proposal and acceptance is constituted by a promise or representation made by one person, and acts done by another person on the faith of such promise or representation. "A representation," said Lord Cottenham,(*i*) "made by one party for the purpose of influencing the conduct of the other party, and acted on by him, will in general be sufficient to entitle him to the assistance of this court for the purpose of realizing such representation."

§ **298**. Representations are of two kinds: the one of things past or present, the other of things future; the one of things done or existing, the other of things to be done. With regard to the former class, whenever a representation as to something alleged as a then existing fact, which representation is not true, has been made by a person who knows it to be untrue, or does not know it to be true,(*j*) to another person in order to induce him to an act, and that act has been thereupon done by the second person to his prejudice, the person making the representation will not be allowed by the court afterwards to turn round and deny the alleged fact. "It shall be," said Lord Mansfield, C. J.,(*k*) "as represented to be." Thus, for example, where one person represented to another, on a treaty for marriage with his

(*i*) In Hammersley v. De Biel, 12 Cl. & Fin., 62, n.; cf. Aylifle v. Tracey, 2 P. Wms., 64, which shows that where the act was not done in reliance on the representation, no contract arises.

(*j*) Per Grant, M. R., in Ainslie v. Medlycott, 9 Ves., 21.

(*k*) In Montefiori v. Montefiori, 1 Wm. Black., 364.

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would insure them, and prepared a written application and a premium note, both bearing date of the 16th, to be signed by the plaintiff; and upon their being returned to the defendants by mail, a policy bearing the same date was to be forwarded to the plaintiff. The plaintiff's agent, who was *postmaster at Hopkinton*, presented the written application and the notes to the plaintiff on the 28th, and the plaintiff signed them forthwith, and left them in the hands of the postmaster, to be forwarded to the defendants. There was a mail every Saturday, and these papers were mailed and forwarded on Saturday, the 3d of February; but the defendants refused to give the plaintiff a policy, the buildings having been destroyed by fire on the 31st of January. In an action for the loss, it was held that no contract of insurance had been completed between the parties, the papers signed being in the hands of his agent, and were not receivable until after the buildings had been destroyed. The cases may not, perhaps, be directly opposed to each other, but the principle upon which they rest are certainly not analagous. From the moment when the minds of the contracting parties meet, signified by overt acts, the agreement is obligatory, although a knowledge of such occurrence is not known at the time to both parties. Mactier v. Frith, 6 Wend., 103. But this assent must, under all circumstances, be signified by overt acts; and therefore an intention to insert in a letter an acceptance of an offer by a person to whom it is directed, but which is accidentally omitted, is of no effect. Frith v. Lawrence, 1 Paige, 434.

daughter, that a certain demand was not existing, he was afterwards restrained by the court from proceeding to recover the demand;(*l*) and where a father represented to a future husband of his daughter that she was entitled after the death of her parents to £10,000, and she was in fact only entitled to about half that amount, the balance was recovered from the father's estate.(*m*) But in these cases, the court acts merely on the principle of preventing fraud, and not at all on contract;(*n*) and they, therefore, do not properly come in for discussion here.

§ **299**. But with regard to representations of something future, and within the power of the party making the statement, the case is different; for such a representation, made for a particular purpose by one person, and followed by conduct in pursuance of it by the other, constitutes a true and proper contract. "There is no middle term," said Lord Cranworth,(*o*) "no *tertium quid* between a representation so made to be effective for such a purpose and a contract; they are identical." In one case an uncle represented that he would buy a warehouse for his nephew, and at the uncle's instance the nephew entered into a binding contract to purchase the warehouse; it was there held that the uncle's estate was bound to find the purchase money.(*p*)

§ **300**. In order to enable the court to give relief on the ground of contract to a person who has acted on the faith of another's statements, the representation or promise on which he relies must be clear and absolute. Therefore, where a father, after declining to enter into a settlement, added that he should allow his daughter the interest of £2,000, and that if she married he *might* bind himself to do it, and pay the principal at his decease, it was held not to be an absolute contract;(*q*) and so where the father of an intended husband made only a promise to recognize his son in common with the rest of his family, but the promise was loose

(*l*) Neville v. Wilkinson, 1 Bro. C. C., 543. See, also, Gale v. Lindo, 1 Vern., 475; Scott v. Scott, 1 Cox, 366; and at law, Montefiori v. Montefiori, 1 Wm. Black., 363; Pickard v. Sears, 6 A. & E., 469; Gregg v. Wells, 10 A. & E., 90; Freeman v. Cooke, 2 Ex., 654; Howard v. Hudson, 2 El. & Bl., 1; Foster v. Mentor Life Assurance Co., 3 id., 48.

(*m*) Bold v. Hutchinson, 20 Beav., 250; affirmed 5 De G. M. & G., 558, on different grounds. See, also, Jameson v. Stein, 21 Beav., 5.

(*n*) Per Lord Cranworth, L. J., in Money v. Jorden, 2 De G. M. & G., 332. See, too, Alderson v. Maddison, 5 Ex. D., where Stephen, J., lucidly classified the different kinds of false representations.

(*o*) In Maunsell v. White, 4 H. L. C., 1056.

(*p*) Skidmore v. Bradford, L. R. 8 Eq., 134; cf. Ridley v. Ridley, 34 Beav., 478.

(*q*) Randall v. Morgan, 12 Ves., 67. See the observations on this case of Lord St. Leonards in Mounsell v. White, 1 Jon. & L., 567.

and vague, and defined no sum, Stuart, V. C., dismissed a bill filed by the son, but under the circumstances directed the costs to be paid out of the father's estate.(*r*) But, on the other hand, where on the treaty for a marriage the father of the intended wife wrote to the intended husband, "At my decease she (the intended wife) shall be entitled to her share in whatever property I may die possessed of," Lord Romilly, M. R., held that this amounted to a contract binding on the father and his estate, and was not too vague to be enforced.(*s*) "When," said his lordship,(*t*) "a man makes a solemn engagement upon an important occasion, such as the marriage of his daughter, he is bound by the promise he then makes. If he induce a person to act upon a particular promise with a particular view which affects the interests in life of his own children and of the persons who become united to them, this court will not permit him afterwards to forego his own words, and say that he was not bound by what he then promised. It is upon these principles that the court has acted in all such cases; it exercises its jurisdiction for the enforcement of the truth, and makes a man's acts square with his words, by compelling him to perform what he has undertaken."

§ **301**. Where the representation is merely of what the person intends to do, or the promise is one for the performance of which the person making it refuses to contract, and insists that the recipient shall rely on his honor, the engagement is of a merely honorary nature, and, therefore, not enforceable by the court.(*u*) In one case the guardians of a young lady, who was a minor, objected to her marriage until a suitable settlement should be made on behalf of her intended husband; his uncle, from whom he had expectations, having been previously consulted on the matter, was informed of this resolution; in reply to which he wrote to his nephew, "My sentiments respecting you continue unalterable; however, I shall never settle any part of my property out of my power so long as I exist. My will has been made for some time, and I am confident that I shall never alter it to your disadvantage. I repeat that my Tipperary

(*r*) Kay v. Crook, 3 Sm. & G., 407.
(*s*) Laver v. Fielder, 32 Beav., 1. See, too, Coverdale v. Eastwood, L. R. 15 Eq., 121.
(*t*) 32 Beav., 12.
(*u*) Cf. Lord Walpole v. Lord Orford, 3 Ves., 402; infra, § 571. See, too, per Stephen, J., in Alderson v. Maddison, 5 Ex. D., 296, 301.

estate will come to you at my death, unless some unforeseen occurrence should take place." The letter further alleged that, as he had never settled anything on any of his nephews, his doing so in this case would cause jealousy in the family; this letter the writer desired might be communicated to the young lady's guardians. It was held that the intention of the uncle was not to settle his property, and that, therefore, the letter could not be treated as a contract.(*v*)

§ **303.** The same principle governed the decision of the case of Money v. Jorden.(*w*) The facts of the case were, shortly, that B. was under a bond for the payment of a sum of money to A.; that B. being about to marry, A. said she should never distress him about the bond, that she had given it up, and would never enforce it; but on being requested to give up the bond, she declined to do so, saying that she would be trusted, and that B. might rely on her word. B. married, and A. subsequently having put the bond in suit, B. sought the interference of the court by injunction. The representations in question were held to be binding by Lord Romilly, M. R., in the first instance, by Knight Bruce, L. J., on appeal, and by Lord St. Leonards in the House of Lords, whilst the contrary was ultimately decided by a majority in the House, consisting of Lords Cranworth and Brougham. The question was, in a considerable part, one of evidence. But Lords Cranworth and St. Leonards differed as to the effect of a representation of intention, the latter holding such to be binding, and the former not.(*x*)

§ **303**. On the same principle, where a settlement was not ready at the time of the marriage, and the lady married on the husband's engagement in honor that she should have the same advantage of the agreement as if it were in writing and duly executed, the court refused to interfere, as the engagement was merely honorary.(*y*) And, again, where letters were sent containing what only amounted to a general assurance that, if a tenant acted to the satisfaction of his landlord, he would deal honorably and handsomely with

(*v*) Maunsell v. White, 1 Jon. & L., 539; affirmed 4 H. L. C., 1039.

(*w*) 15 Beav., 372; 2 De G. M. & G., 318; 5 H. L. C., 185

(*x*) With regard to the force of an expression of intention, see, besides the cases above stated, Norton v. Wood, 1 R. & My., 178; Cross v. Sprigg, 6 Ha., 553; Laver v. Fielder, 32 Beav., 1; Coverdale v. Eastwood, L. R. 15 Eq., 121; Loffus v. Maw, 3 Giff., 592, and infra, §§ 311, 312.

(*y*) Viscountess Montacute v. Maxwell, 1 P. Wms., 618.

him in regard to renewing his lease, this assurance was discriminated from a matter of contract, and was not enforced by the court.(*z*)

§ **304**. The circumstances of the case of Morehouse v. Colvin (*a*) were these: A testator who had, by his will, bequeathed £12,500 to his daughter, wrote a letter to an old friend of his in India, to whom the young lady was consigned, and therein stated that, in case of her marrying with his approbation, her husband should have £2,000 on the marriage, and continued, "nor will that be all: she is and shall be noticed in my will; but to what further amount I cannot precisely say, owing to the present reduced and reducing state of interest, which puts it out of my power to determine at present what I may have to dispose of." The substance of these terms was communicated to the intended husband; the testator revoked his will, and made another, omitting the legacy, and giving his daughter a residuary and contingent interest; Lord Romilly, M. R., and afterwards the court of appeal in chancery, held that there was no contract which could be enforced.

§ **305**. Where, subsequently to representations of the sort which we have been considering, a settlement has been executed making a provision but taking no notice of the subject of the representations, a presumption arises that the settlement contains the whole contract, and this, if not rebutted, is, of course, a bar to any relief on the representations.(*b*)

§ **306**. The same result more clearly follows where not only is there a settlement which is silent as to the promise, but where it appears that the marriage was determined on long before the promise. There it is evident that the promise did not induce the marriage.(*c*)

§ **307**. We will now proceed to consider the cases in which a representation, followed by conduct of the party to whom it is made, has been held to be binding.

§ **308**. These cases have, for the most part, turned upon representations made in the course of marriage treaties, followed by marriage made on the faith of such representations—a class of cases in which the court is inclined to

(*z*) Price v. Assheton, 1 Y. & C. Ex., 441.
(*a*) 15 Beav., 341.
(*b*) Loxley v. Heath, 1 De G. F. & J., 489; Sands v. Soden, 31 L. J. Ch., 870; Re Badcock, 29 W. R., 278.
(*c*) Goldicutt v. Townsend, 28 Beav., 445.

attach more than ordinary weight to the language of the one party, when it is calculated to convey a false impression to the other.(*d*)

§ **309**. Where the proposal is in writing, the marriage, and other acts, are relied on only as evidence of acceptance; but where the proposal has been verbal, the acts must be relied on also as constituting a case of part performance, for which purpose marriage alone is, from the words of the Statute of Frauds, not sufficient. The cases on part performance in connection with such contracts,(*e*) and also of marriage in fraud of a parol contract, (*f*) are represectively considered elsewhere.

§ **310**. The principle of the cases now under discussion is established by several old decisions, to which it will be sufficient to refer(*g*) before considering the more recent cases.

§ **311**. In Luders v. Anstey,(*h*) a husband, before marriage, wrote a letter proposing a settlement of the lady's fortune, securing certain benefits to the children of the lady's first marriage. Shortly afterwards the marriage took place, and Lord Loughborough held that the husband was bound by the letter, though bonds to execute a settlement had subsequently been entered into, also securing benefits, but different ones, to the same children. "There is no *locus pœnitentiæ*," said his Lordship, "in this case; and I should require a positive distinct dissent; and that could not be evidenced by anything but an actual settlement before marriage, varying from that. In Saunders v. Cramer,(*i*) a paper signed by a lady, expressing her intention of leaving her granddaughter a certain sum, to be secured by a bond, which offer was to be, and was, in fact, communicated to the intended husband of the young lady, and was followed by a marriage, was held a binding proposal. The mention of the bond went to show that it was intended to be binding on the party making it.

§ **312**. In De Beil v. Thompson,(*j*) in written proposals made on the marriage treaty the father expressed that he "intended to leave his daughter a further sum of £10,000

(*d*) Per Lord St. Leonards in Maunsell v. White, 1 Jon. & L., 563.
(*e*) See infra, § 593 et seq.
(*f*) See infra, § 553.
(*g*) Moore v. Hart, 1 Vern., 110, 201; Wankford v. Fotherley, 2 Id., 322; Halfpenny v. Ballet, Id., 373; Cookes v. Mascall, Id., 200.
(*h*) 4 Ves., 501; S. C., 5 Id., 213.
(*i*) 3 Dr. & War., 87.
(*j*) 3 Beav., 469.

in his will, to be settled on her and her children, the disposition of which, supposing she had no children, to be prescribed by the will of her father." This was held to create an obligation. These proposals were made subject to revision; but it was held that that power was determined by their acceptance by the intended husband, and the marriage with the father's consent. This decision of Lord Langdale, M. R., was affirmed by Lord Cottenham,(*k*) and afterwards by the House of Lords.(*l*)

§ **313**. In Montgomery v. Reilly,(*m*) the eldest son came into estates, subject to a jointure to his mother and portions to his brothers and sisters, and carried on a correspondence with a friend of the family with a view to the increase of these charges, and ordered the payment of the increased jointure and interest on the increased portions. On the faith of a representation made on the strength of these acts by the family friend, a daughter married; the interest on the increased portion was continued to be paid to the daughter, and the agent's accounts in which these payments were stated passed; and the eldest son took possession of some property under the arrangement with his brothers and sisters, to which he would not otherwise have been entitled. The House of Lords decided that there was a contract binding on the eldest brother, and specifically enforced it.

§ **314**. In Prole v. Soady,(*n*) the court, notwithstanding a considerable conflict of evidence, came to the conclusion that previously to and in contemplation of the marriage of the plaintiff's father and mother, the natural father of the lady had represented to the intended husband and to other persons that a certain estate of his in Scotland and a sum of 105,000 sicca rupees were settled by him as a provision for his daughter and her children, and that the marriage was contracted in a confidence in that representation. It was part of the defendant's case that at the date of the marriage there was an existing testamentary settlement of the property in question in favor of the lady; but the court held that such an instrument, if it existed, was made irrevocable by the representations of the father, and it gave the plaintiff relief on the ground of the representation made.

(*k*) 12 Cl. & Fin., 61, n.
(*l*) 12 Cl. & Fin.; 46 *sub nom.* Hammersley v. De Biel.
(*m*) 1 Bli. (N. S.), 364; S. C., 1 Dow (N. S.), 62.
(*n*) 2 Giff., 1.

And in a later case the same judge (Stuart, V. C.) held that a gift made by a codicil in pursuance of a promise by an uncle to his niece, on the faith of which she altered her position in life and continued to act as his caretaker, became irrevocable by force of the promise and conduct.(*o*) In Coverdale v. Eastwood (*p*) the contract was contained in letters, and the only serious question was one of construction.

§ **315**. The representations need not be made by the persons most immediately interested in the marriage treaty. In one case a legatee on his marriage assigned part of his legacy to the trustees of his settlement, and covenanted to pay the amount by installments. It was proved that the marriage was contracted, and the settlement made on the faith of representations by the executor that the legacy was substantial and safe and would be paid though at a future time. The estate of the testator proving insufficient to pay the legacies, it was held that, by force of the representations, the estate of the executor was liable for the amount of the legacy.(*q*).

§ **316**. The doctrine in question seems to have been carried to its fullest limits in the case of Piggott v. Stratton.(*r*) The defendant Stratton was lessee for a long term of plots A, B, and C. The lease contained a covenant that any new houses should be detached and separated from one another by an open space of not less than thirty feet. Plot C lay between B and the sea. The defendant Harbour, under whom the plaintiff claimed as assign, negotiated with Stratton for an under-lease of part of B, and Stratton in answer to a question stated that he could not build closer than thirty feet because the lease forbad him, and Harbour swore that thereupon he was induced to take the land, and further that in order to satisfy himself he asked for and was shown a draft of the lease. An under-lease was executed containing covenants referring to the original lease. The original lease was surrendered, and a new lease granted with different covenants, and Stratton the lessee proposed to build so as not to leave the thirty feet space. Lord Hatherley (then Wood, V. C.) held that the covenants in the under-lease did

(*o*) Loffus v. Maw, 3 Giff., 592; see Alderson v. Maddison, 5 Ex. D., 293, 300; reversed in C. A., W. N., 1881, p. 68.

(*p*) L. R. 15 Eq., 121.

(*q*) Hutton v. Rossiter, 7 De G. M. & G., 9.

(*r*) Johns., 314; S. C., 1 De G. F. & J., 33.

not restrain this conduct, but that the representation did. He held it equivalent to a representation that the lease was an instrument by which the property was secured to the purchaser in a course of enjoyment, and that to permit him to alter that course would be to permit him to derogate from his own grant. Lord Campbell and Turner, L. J., held that the defendant was bound both by his covenants in his under-lease and by his representation. Knight Bruce, L. J., held that he was bound by his covenants, but declined to give any opinion on the other point. It will not escape notice that in this case the only representation made was one of an existing fact, viz.: the existence of the lease, that there was no statement that the state of things should continue, or that the lease should not be surrendered or allowed to drop, and that to infer from the existence of a lease that it should never be surrendered, seems, in the absence of express contract, a somewhat strong inference. The case is, however, one of the highest authority.

CHAPTER III.

OF THE INCOMPLETENESS OF THE CONTRACT.

§ **317**. "Nothing is more established in this court," said Lord Hardwicke,(*a*) speaking of contracts which the court will enforce, "than that every agreement of this kind ought to be certain, fair and just in all its parts. If any of those ingredients are wanting in the case, this court will not decree a specific performance." "I lay it down as a general proposition," said Lord Rosslyn,(*b*) "to which I know no limitation, that all agreements, in order to be executed in this court, must be certain and defined; secondly, they must be equal and fair; for this court, unless they are fair, will not execute them; and thirdly, they must be proved in such manner as the law requires."[1]

§ **318**. In regard to objections founded on the want of any of these qualities in the contract, or on the incapacity of the court to perform the contract, or its illegality, the court is, from obvious motives of justice, somewhat unwilling to entertain the objection, when it is made after part performance, from which the defendant has derived benefits, and the plaintiff cannot be fully recompensed except by the performance of the contract *in specie*.(*c*) When a contract has been partly executed by possession having been taken under it, the court, it has been said, "will strain its power to enforce a complete performance."(*d*)[2]

(*a*) In Buxton v. Lister, 3 Atk., 386. See infra, § 488.
(*b*) In Lord Walpole v. Lord Orford, 3 Ves., 420; accordingly, Underwood v. Hitheox, 1 Ves. Sen., 279; Franks v Martin, 1 Eden, 309.
(*c*) See §§ 83, 459.
(*d*) Parker v. Taswell, 2 De G. & J., 559, 571.

[1] Upon an application to a court of chancery for a decree of specific performance, in order to merit the interposition of its powers, the agreement must be found to be fair and equitable, certain and consistent with public policy, free from fraud or surprise, not voluntary, and just in all its parts, or at least tend to produce a just end. Griffith v. Frederick County Bank, 6 Gill & J., 424; Seymour v. Delancey, 3 Cow., 445; Modisett v. Johnson, 2 Blackf., 431; Millard v. Ramsdell, Harring. Ch., 373; Ohio v. Baum, 6 Ham., 383. Unless the evidence offered in support of a contract be fully sufficient and ample, a court of equity will not exercise its jurisdiction to enforce it. Colson v. Thompson, 2 Wheat., 336.

[2] *Negotiation.*] When any part of an agreement remains to be settled by

§ **319**. The qualities of completeness, certainty and fairness, which will be now considered, will in great part be best explained by showing cases in which they have been considered as being wanting. The qualities of completeness and certainty are not perhaps truly separable; but under the former those cases will be rather considered where there is the absolute want of some term in the contract; under the latter head of certainty, those where it is not the entire want of the term, but the want of sufficient exactitude in it, which has furnished a defense to a specific performance.(*e*)[1]

§ **320**. It is evident that incompleteness may be in the contract itself—in which case there is properly speaking no contract, or in the evidence—in which case there is no sufficient memorandum. But nevertheless it seems not inconvenient to consider these defects together.

§ **321**. The time at which the completeness of the contract is to be ascertained was the filing of the bill, and is now the commencement of the action; so that it was not sufficient for the purpose of obtaining an immediate decree, to prove that the consent of a tenant for life, which was essential to the contract, was given before the hearing.(*f*) It is an obvious principle of justice, that the adoption of a contract by a third party shall not so relate back as to subject a party to legal proceedings in respect of its non-performance, the non-performance having at the time been justifiable.(*g*)

§ **322**. To this principle there are some exceptions, or

(*e*) See, also, the cases stated Infra, § 488. Mann v. Walters, 10 B. & C., 626; Doe d'
(*f*) Adams v. Brooks, 1 Y. & C. C. C., 627. Lyster v. Goldwin, 2 Q. B., 143.
(*g*) Right v. Cuthell, 5 East, 491; Doe d.

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negotiation, it is incomplete. Potts v. Whitehead, 20 N. J. Eq., 55; Myers v. Forbes, 24 Md., 598.

Incomplete contract.] Where a contract is incomplete, specific performance of it will not be decreed if that objection is raised. Hopkins v. Gilman, 22 Wis., 476; Madox v. McQueen, 3 A. K. Marsh., 400; Ohio v. Baum, 6 Ohio, 383; Southern Ins. Co. v. Cole, 4 Fla., 359; Hammer v. Eldowny, 46 Pa. St., 334; McKibbin v. Brown, 14 N. J. Eq., 13; Neville v. Merchants' Ins. Co., 19 Ohio, 452; Johnson v. Johnson, 16 Minn., 512.

Contract incomplete as to time.] Where the contract does not specify the time when it is to be performed, or fix the same, it is too incomplete to be enforced at equity. Time being included in the terms, may become of the essence of the contract. Potts v. Whitehead, 20 N. J. Eq., 55; Williams v. Stewart, 25 Minn., 516; Baker v. Glass, 6 Munf., 212; Hoff v. Shepherd, 58 Mo., 242; Wiley v. Roberts, 31 id., 212; see, however, Friebert v. Burgess, 11 Md., 452.

[1] *Contract must be completely determined.*] In order that a party shall be entitled to a decree for the specific performance of a contract, such contract must have been completely determined, and its terms definitely ascertained. Brown v. Brown, 33 N. J. Eq., 650.

apparent exceptions, which it is well briefly to notice. When the contract is incomplete through the default of the defendant, and the incompleteness is one which can be remedied, the court will not refuse its aid; thus, where a contract had been entered into for granting an annuity for three lives to be named, and the consideration had been paid, but through the defendant's refusing to proceed the lives had not been named, the plaintiff was allowed to perfect his contract by nominating three lives who were in being at the time of the contract.(*h*)[1] So where the defendant agreed to build a house on the plaintiff's land and the plaintiff agreed thereupon to grant a lease which the defendant agreed to accept; and the defendant pulled down the old house but neglected to build the new one; the court held that the contract to accept a lease gave it jurisdiction; that damages could be awarded under Lord Cairns' act for the non-performance of the contract to build, and that this condition being thus satisfied the plaintiff could have performance of the defendant's contract to accept a lease.(*i*)

§ **323**. An action may be maintained on a contract where, though some term be not ascertained, the court has the means of ascertaining it, on the principle of the maxim *id certum est quod certum reddi potest.* Thus, in a contract for the sale of lands under the lands clauses consolidation act, in which the sum was not ascertained, the court decreed the defendants to issue their warrant to the sheriff to summon a jury to settle the compensation;(*j*) and the same principle is illustrated by the cases on the requisite completeness as to subject matter and price.(*k*)

§ **324**. The necessary completeness of the contract may be considered in respect of (1) the subject-matter, (2) the parties to the contract, (3) the price, and (4) the other terms.

§ **325**. (1) Every valid contract must contain a description of the subject-matter;[2] but it is not necessary that it

(*h*) Pritchard v. Ovey, 1 J. & W., 396; Lord Kensington v. Phillips, 3 Dow, 61.
(*i*) Soames v. Edge, Johns., 669; Middleton v. Greenwood, 2 De G. J. & S., 142. Distinguish Norris v. Jackson, 1 J. & H., 319.
(*j*) Walker v. Eastern Counties Railway Co., 6 Ha., 594 See, also, Owen v. Thomas, 3 My. & K., 353; Monro v. Taylor, 8 Ha., 51.
(*k*) Infra, §§ 328, 335.

[1] In Prater v. Miller, 3 Hawks, 628, it was held that though specific performance would not be decreed of a contract uncertain in its terms, still, where the agreement may be made certain by means of references furnished by the contract, it will be enforced.

[2] *Definiteness.*] The subject-matter of a contract must be defined with clear-

should be so described as to admit of no doubt what it is; for the identity of the actual thing and the thing described may be shown by extrinsic evidence. This flows from the very necessity of the case; for all actual things, except the contract itself, being outside of and beyond the contract, the connection between the words expressing the contract and things outside it must be established by something other than the contract itself, that is, by extrinsic evidence; the same rule is admitted, and from the like necessity, with regard both to persons and things mentioned in wills; (*l*) and in the cases of contracts within both the fourth and the seventeenth sections of the Statute of Frauds, parol evidence as to identity is admissible.(*m*) Thus, for instance, the expression "Mr. Ogilvie's house," was held sufficient, and extrinsic evidence was admitted to show what house it referred to.(*n*)[1] In another case a subject-matter described as "the mill property, including cottages in Esher village," was held capable of identification by parol evidence.(*o*) The expressions "this place" (*p*) and "the lease" (*q*) have been held sufficient descriptions of the thing sold; and "your word" has been explained by parol evidence of a previous conversation.(*r*) So where a contract referred to another writing, parol evidence of the identity of a certain writing with that referred to was admitted; (*s*) and in another case parol evidence was admitted to show the mean-

(*l*) See per Lord Cranworth (then Rolfe, B.) in Clayton v. Lord Nugent, 13 M. & W., 207.
(*m*) Sarl v. Bourdillon, 1 C. B. (N. S.), 188.
(*n*) Ogilvie v. Foljambe, 3 Mer., 53
(*o*) McMurray v. Spicer, L. R. 5 Eq., 527.
(*p*) Waldron v. Jacob, L. R. 5 Eq., 131.
(*q*) Horsey v. Graham, L. R. 5 C. P., 9.
(*r*) Macdonald v. Longbottom, 1 El. & El., 977.
(*s*) Clinan v. Cooke, 1 Sch. & Lef., 21, 33. See infra, § 521.

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ness; so that the party and the court may know what is contracted for. King v. Ruckman, 20 N. J. Eq., 316; Carr v. Passaic Land Co., 22 id., 35; Ross v. Baker, 72 Pa. St., 186; Miller v. Campbell, 52 Ind., 125; Holmes v. Evans, 48 Miss., 217; Bell v. Warren, 39 Texas, 106; Lynes v. Hayden, 119 Mass., 482.

Extrinsic evidence may be used to explain ambiguous terms, or the relations sustained towards each other by parties. Warring v. Ayres, 40 N. Y., 357; Robeson v. Horntaker, 2 Green's Ch., 60; Fowler v. Redican, 52 Ill., 405; Mead v. Parker, 115 Mass., 413.

Example.] A bond for the sale of real estate was in every respect unobjectionable, except the description, which was incomplete, but consistent so far as it went. Held, that extrinsic parol evidence might be employed to complete it, if no new description was introduced into the contract, and the pleadings contained the necessary averments. Torr v. Torr, 20 Ind., 118; Price v. Griffith, 1 De G. M. & G., 80; King v. Wood., 7 Miss., 389; 1 Greenlf. Ev., § 287.

[1] Upon the same principle, specific performance of a contract will not be refused, because in the description of the land it omitted to state the town in which it lies, where the description is otherwise rendered definite. Robeson v. Horntaker, 2 Green's Ch., 60.

ing of "£50 more of premium," and of "the profit rent of the present tenant." (*t*) A general description of the subject matter is sufficient; as, *e. g.*, "the Bank End estate," although the contract itself may provide for the parcels being subsequently defined.(*u*)

§ **326**. Where it is necessary to call in extrinsic evidence, the connection of the subject-matter of the contract, and the thing in respect of which specific performance is sought, must be pleaded and supported by sufficient evidence.(*v*)

§ **327**. It is, however, essential that the description of the subject matter should be so definite, as that it may be known with certainty what the purchaser imagined himself to be contracting for,(*w*) and that the court may be able to ascertain what it is.(*x*) And so in a case where there was a contract for the letting of "coals, etc," the statement of the subject-matter was thought by Knight Bruce, L. J., insufficient, and specific performance was refused on that amongst other grounds.(*y*)[1]

§ **328**. With regard to the description of the subject-matter, the maxim *id certum est quod certum reddi potest* applies. Thus, where the memorandum of the contract contained no specific description of the property sold, but referred to the deeds as being in the possession of a person named, the court thought that the property might easily be ascertained before the master, and held the description of the subject-matter sufficient.(*z*) And, again, a contract to sell an estate within certain ascertained boundaries, described as partly freehold, and partly leasehold, is not void for uncertainty, because it is a good contract to sell the vendor's interest in the property; but the purchaser is entitled to have it reduced to certainty by the boundary of the properties of different tenures being ascertained, or shown to be capable of being so.(*a*)

(*t*) Skinner v. M'Douall, 2 De G. & Sm., 265.
(*u*) Haywood v. Cope, 25 Beav., 140.
(*v*) Price v. Griffith, 1 De G. M. & G., 80.
(*w*) Stewart v. Alliston, 1 Mer., 26, 33.
(*x*) Kennedy v. Lee, 3 Mer., 441, 451; per Lord Eldon in Daniels v. Davison, 16 Ves., 256.
(*y*) Price v. Griffith, 1 De G. M. & G., 80. See, also, Inge v. Birmingham, Wolverhampton and Stour Valley Railway Co., 3 De G. M. & G., 658.
(*z*) Owen v. Thomas, 3 My. & K., 353; cf. Naylor v. Goodall, 26 W. R., 162.
(*a*) Monro v. Taylor, 8 Ha., 51.

[1] The description of land, which is the subject-matter of the contract, is clearly an essential particular, and, as such, if indefinite to such an extent as to be incapable of being ascertained by the admission of extrinsic evidence, goes to its essence and avoids the obligations of the agreement. McMurtrie v. Bennett, Harring. Ch., 124.

§ **329**. So the uncertainty of description of the subject-matter may be got over by the election of one party to the contract, where the effect of the contract is to give such a right of election. Thus, where a contract was made by the defendant to sell to the plaintiff for the purpose of a churchyard so much land as was necessary on the north side of the church, and the plaintiff obtained the sanction of the proper authorities to the consecration of three-quarters of an acre of land adjoining the north side of the existing enclosure of the church and applied to the defendant to convey, it was held that the plaintiff being the person to do the first act under the contract had a right of election, and that if otherwise there was uncertainty of description he had sufficiently ascertained the land to be conveyed.(*b*) A similar decision was pronounced in a case where the difficulty arose on a contract to let a glebe "except thirty-seven acres," and it was held that the right of election was with the lessee as the person who had the first act to do.(*c*) With these cases may be compared the cases on executory contracts for the sale of goods not specified, where the appropriation by the party entitled to elect converts the executory contract into an actual sale and passes the property to the vendee.(*d*)

§ **330**. (2) The contracting parties must appear in the contract, or the memorandum of it, in order to constitute a binding contract;(*e*)[1] but they may so appear either by name or by description, or by reference sufficient to ascertain their identity.(*f*) Where the defendant made a written offer to take a lease, beginning "Sir," but without address, and the plaintiff's agent wrote an acceptance, but there was no document signed by the defendant showing the intended lessee's name, it was held that there was no written contract.(*g*)

(*b*) Rumble v. Heygate, 18 W. R., 749.
(*c*) Jenkins v. Green, 27 Beav., 437.
(*d*) See the cases collected in Benjamin on Sales, Book II, ch. 5.
(*e*) Champion v. Plummer, 1 N. R., 253; Warner v. Willington, 3 Drew., 523; Squire v. Whitton, 1 H. L. C., 333; Williams v. Lake, 2 El. & El., 349. Cf. Skelton v. Cole, 1 De G. & J., 537, 596.
(*f*) Potter v. Duffield, L. R. 18 Eq., 4.
(*g*) Williams v. Jordan, 6 Ch. D., 517.

[1] It is not however, necessary that in all cases the names of both parties to an instrument appear upon its face, in order to obtain relief in equity. Thus, where the owner of land transmitted to a proposed purchaser a memorandum of an agreement to purchase, with a request that he would sign it in case he wished to purchase, which was signed accordingly, it was held that it was binding upon both parties, though it contained no promise to sell, and was not signed by the vendor. Butler v. O'Hear, 1 Dessau., 382.

§ **331**. The contracting parties may be indicated by description instead of by name, provided the description is sufficient to preclude any fair dispute as to the identity ;(*f*) or, in other words, is certain within the legal maxim, *id certum est quod certum reddi potest ;*(*h*) and provided this description is not by reference, but to the contract itself. "It is scarcely possible," said Lord Romilly, M. R.,(*i*) "to look at an auction list without seeing property sold by a mortgagee, or by executors, or by trustees, without the name being disclosed, and bought by somebody whose name is not given until the conveyance is prepared. It is the ordinary practice."

§ **332**. "Your lordships," said Earl Cairns, addressing the House of Lords, "have frequently seen conditions of sale not merely by auction but by private contract, in which it is stated that the sale is made, sometimes by the *owners*, and sometimes by the *mortgagees*, and a form of contract is annexed in which an agent signs for the vendors, and no other specification upon the vendors' part is inserted, and I never heard up to this time that a contract under those circumstances was invalid. In point of fact, my lords, the question is, is there that certainty which is described in the legal maxim *id certum est quod certum reddi potest.* If I enter into a contract on behalf of my *client*, on behalf of my *principal*, on behalf of my *friend*, on behalf of *those whom it may concern*, in all those cases there is no such statement, and I apprehend that in none of those cases would the note satisfy the requirements of the Statute of Frauds. But if I, being really an agent, enter into a contract to sell Blackacre, of which I am not proprietor, or to sell the house No. 1, Portland Place, on behalf of *the owner* of that house, there, I apprehend, is a statement of matter of fact, as to which there can be perfect certainty, and none of the dangers struck at by the Statute of Frauds can arise."(*j*)

§ **333**. In one case already referred to,(*k*) the sale was stated to be by direction of the executors of Admiral F.,

(*f*) Potter v. Duffield, L. R. 18 Eq., 4.
(*h*) Rossiter v. Miller, 5 Ch. D., 648; 3 App. C., 1124, 1140.
(*i*) Hood v. Lord Barrington, L. R. 6 Eq., 218. See, too, Bourdillon v. Collins, 19 W. R., 556.
(*j*) Rossiter v. Miller, 3 App. C., 1140. The italics are not in the report.
(*k*) Hood v. Lord Barrington, L. R. 6 Eq., 218. See, too, Towle v. Topham, 37 L. T., 308; Webb v. Kirby, 3 Sm. & G., 337.

and, in another,(*l*) the vendor was stated to be a trustee selling under a trust for sale; and in each case the description was held sufficient. Again, where the contract stated the sale to be by direction of the proprietor, that was held to be a sufficient description.(*m*) In another case, where property was sold by ten persons incorporated, who worked the property in the name of a company, it was held that the description "the vendors" was enough, because it appeared from the conditions of sale and memorandum of the contract, that the vendors were in possession; that the abstract would be an abstract of the company's title, and that it was the interest of the company which was being sold.(*n*)

§ **334**. But where the contract did not disclose the vendor's name, but stated the auctioneer's name, and the auctioneer signed the contract as confirming it "on behalf of the vendor," the memorandum was held insufficient, because the question who sold the estate (*i. e.*, the question of the contract) was left to be decided by parol evidence.(*o*)

§ **335**. (3) In all cases of sale it is evident that price is an essential ingredient of the contract, and that where this is neither ascertained nor rendered ascertainable, the contract is void for incompleteness, and incapable of enforcement.(*p*)[1] Accordingly where A. agreed to sell an estate to B. for £1,500 less than any other purchaser would give, the contract was held void; for if the estate was not to be sold to any other purchaser than B., it was impossible to know what such a purchaser would give for it.(*q*) So, again, where there was a contract to sell at a price to be fixed by two surveyors, and they made their valuation, but that did not sufficiently and finally ascertain the price, specific performance was refused;(*r*) and the like was the result of a similar

(*l*) Catling v. King, 5 Ch. D., 660.
(*m*) Sale v. Lambert, L. R. 18 Eq., 1. See, too, Rossiter v. Miller, 5 Ch. D., 648; 3 App., C., 1124; Beer v. London and Paris Hotel Co., L. R. 20 Eq., 412; and Thomas v. Brown, 1 Q. B. D., 714.
(*n*) Commins v. Scott, L. R. 20 Eq., 11.
(*o*) Potter v. Duffield, L. R. 18 Eq., 4.
(*p*) Elmore v. Kingscote, 5 B. & C., 583; Goodman v. Griffiths, 1 H. & N., 574. Consider Langstaff v. Nicholson, 25 Beav., 160.
(*q*) Bromley v. Jefferies, 2 Vern., 415.
(*r*) Hopcraft v. Hickman, 2 S. & S., 130.

[1] *Price must be fixed.*] A contract will not be specifically enforced unless the price is fixed. Darby v. Whitaker, 4 Drew, 134; Graham v. Call, 5 Munf., 396.

Contract cannot be changed.] A contract cannot be changed, and then enforced, even by a court of equity. Valetti v. White Water Canal Co., 4 McLean, 192; Cassady v. Woodbury, 13 Iowa, 113; Haskell v. Allen, 23 Me., 448; Gray v. Tubbs, 43 Cal., 359; Philadelphia R. R. Co. v. Lehigh Co., 36 Pa. St., 204

case, where the valuation was such as the court could not act on, by reason of circumstances of great impropriety on the part of one of the valuers, and the valuation being based on an erroneous view of the facts.(*s*)

§ **336**. It is not, however, necessary that the contract should in the first instance determine the price.(*t*) It may either appoint a way in which it is to be determined, or it may stipulate for a fair price.

§ **337**. Where the contract appoints a way of determining the price, the courts have in some cases deemed that way essential; in other cases they have deemed it non-essential, and have treated the contract as essentially one to sell at a fair price. In all cases where the principal subject of the contract is to be valued in a specified manner, the manner has, it is believed, been held essential:(*u*) the manner has often been held non-essential where it is applied only to an incident to the main subject, as timber to land, fixtures to a house, or plant to a business.

§ **338**. Where the contract specifies a way of ascertaining the price which is essential, the contract is conditional till the ascertainment, and is absolute only when the price has been determined. In case of default in this respect the contract remains imperfect, and incapable of being enforced; for the court will never direct the payment of such a sum as A. may fix.(*v*)

§ **339**. If the contract be between A. and B. to sell and buy at such a price as valuers to be named by them shall fix, it seems that either A. or B. may refuse to name a valuer, and the contract will remain incapable of completion without any liability on the part of the refusing party.(*w*) But if the contract between A. and B. be to sell and buy at such a price as C. shall fix, neither A. nor B. can rightfully prevent C.'s determination and the completion of the contract; and it is presumed that an action might be maintained for such prevention.(*x*) "*Actus inceptus*," says one of Lord Bacon's maxims,(*y*) "*cujus perfectio pendet ex voluntate partium, revocari potest: si autem pendet ex vol-*

(*s*) Chichester v. McIntyre, 4 Bli. (N. S.), 78.

(*t*) See London Guarantie Co. v. Fearnley, 5 App. C., 920.

(*u*) Milnes v. Gery, 14 Ves., 400. 408.

(*v*) Darby v. Whitaker, 4 Drew., 134; Tillett v. Charing Cross Bridge Co., 26 Beav., 419. Consider Baker v. Metropolitan Railway Co., 31 Beav., 504.

(*w*) See as to the French law on this point, Troplong, De la Vente, § 157.

(*x*) Smith v. Peters, L. R. 20 Eq., 511, infra, § 343.

(*y*) No. 20.

untate tertiæ personæ vel ex contingenti, non potest." One of his illustrations is this: "If I contract with you for cloth at such a price as J. S. shall name, then if J. S. refuse to name, the contract is void, but the parties cannot discharge it, because they have put it in the power of the third person to perfect.(*z*)

§ **310**. The conclusion that a valid sale could be effected at such a price as a third person should fix was not arrived at in the Roman law without great doubt, or finally settled until the time of Justinian. Ofilius and Proculus maintained the validity of such a sale; Labeo and Cassius denied it.(*a*) "*Sed nostra decisio*," says Justinian, after adverting to the doubts of the ancients, "*ita hoc constituit, ut quotiens sic composita sit venditio quanti ille æstimaverit, sub hac condicione staret contractus ut, si quidem ipse qui nominatus est pretium definierit, omnimodo secundum ejus æstimationem et pretium persolvatur et res tradatur, ut venditio ad effectum perducatur, emptore quidem ex empto actione, venditore autem ex vendito agente. Sin autem ille qui nominatus est vel noluerit vel non potuerit pretium definire, tunc pro nihile esse venditionem, quasi nullo pretio statuto.*"(*b*) The principle thus established by Justinian is embodied in the French law,(*c*) and has found its way into our jurisprudence.

§ **311**. The persons nominated to value are sometimes, though inaccurately, spoken of as arbitrators. Arbitrators are appointed to settle a pre-existing dispute; valuers to ascertain the value of the subject-matter of the sale. It follows that the provisions of the common law procedure act, 1854 (17 and 18 Vict., ch. 124, s. 12), are not applicable to valuers named in a contract.(*d*)

§ **312**. Of the first class of cases, viz.: those in which the contract provides the mode of ascertaining the price, and this provision is an essential term, Milnes v. Gery,(*e*) may be considered as the leading case. There was there a contract that land should be sold at a price to be fixed by one valuer appointed on each side, or their umpire; the valuers could not agree; and Grant, M. R., held the contract to be incomplete, and that the court could not supply the defect by

(*z*) Maxims, ed. 1636, pp. 71, 73.
(*a*) Troplong, De la Vente, § 156.
(*b*) Inst. Lib., 3 tit. 23, § 1.
(*c*) Code Civil, art. 1592.
(*d*) Collins v. Collins, 26 Beav., 306.
(*e*) 14 Ves., 400.

appointing other persons as valuers, which would be to execute a contract different from that of the parties; although, where it is merely a contract to sell at a fair price, that is a matter which the court can ascertain. "A man," said Leach, V. C.,(*f*) "who agreed to sell at a price to be named by A., B., and C., could not be compelled by a court of equity to sell at any other price." This principle has governed the decision of several other cases of specific performance,(*g*) and may further be illustrated by the cases at common law.(*h*)[1]

§ **343**. The difficulty has in several cases prevailed, notwithstanding the fact that the obstacle has arisen from the defendant's default. Thus where the contract was to sell at a price to be fixed by arbitrators, but, in consequence of the defendant having refused to execute the arbitration bond, it was uncertain whether any award would be made, the court refused to proceed;(*i*) and the same result followed where the refusal of one of the valuers to proceed appeared to arise from the information given to him by the defendant, of his intention not to complete.(*j*) But where a vendor had agreed to sell a public house for £10,700, and the furniture and fixtures in it at a fair valuation to be made by L., and after L. had commenced taking the inventory, the vendor refused to allow him to complete it, Jessel, M. R., on an interlocutory application, made an order that L. be permitted to enter the premises for the purpose of completing the valuation.(*k*) In a case where the price was to be

(*f*) In Morse v. Merest, 6 Mad., 26.
(*g*) Blundell v. Brettargh, 17 Ves., 232; Gourlay v Duke of Somerset, 19 Ves., 429; Agar v. Macklew, 2 S. & S., 418; Darbey v. Whitaker, 4 Drew., 134.
(*h*) E. g, Thurnell v. Balburnie. 2 M. & W., 786; Morgan v. Birnie, 9 Bing., 672; Milner v. Field, 5 Ex., 829.
(*i*) Wilks v. Davis, 3 Mer., 507; Vickers v. Vickers, L. R. 4 Eq., 529. Cf. Morse v. Merest, 6 Mad., 26.
(*j*) Darbey v. Whitaker, 4 Drew., 134; Vickers v. Vickers, L. R. 4 Eq., 529.
(*k*) Smith v. Peters, L. R. 20 Eq., 511.

[1] A. and B. built a mill together. A. agreed to convey his moiety to B. on his paying to him the amount which it cost A., and they further agreed to refer it to several persons named to ascertain the cost. The referee's could not agree, and A. refused to have an umpire chosen. B. filed a bill for a specific performance of the contract by A., praying an account of the cost by A., that he receive that sum, and make a conveyance. Held, that to grant the prayer of the bill would be to make a contract for the parties, and then execute it; and that the agreement of A. was not to convey on payment to him of the cost of his part of the mill, but on the payment of the cost as ascertained by the arbitrators named. Norfleet v. Southall, 3 Mur., 189. In Graham v. Call, 5 Munf., 396, where, by an agreement for the sale of land, the price was to be ascertained and fixed by the parties, and one of them died before that price had been fixed by them, it was held that the agreement was too incomplete and uncertain to be enforced specifically in equity.

ascertained by one of two alternative modes, and no election had been made as to the mode of ascertainment, the court held that no contract had been constituted.(*l*)

§ **344**. In a case between a landowner and a railway company, a contract had been entered into under which the company was to do certain works. By a subsequent contract an estimate of the cost of completing the works was to be made by the company's engineer and submitted to A., the landowner's agent, "for approval;" in case of difference the amount was to be determined by B.; the amount "when agreed or determined" was to be paid to the landowner by the company in discharge of their obligations as to the works. A. died before approving any estimate. B. was living; it was held that by A.'s death the contract became incapable of enforcement.(*m*)

§ **345**. Again, where a railway company contracted for the purchase of land with a charitable corporation who had no power to sell except under the lands clauses consolidation act, and the price had not been ascertained by surveyor's certificate pursuant to the provisions of that act, the court held that no final contract had been arrived at.(*n*) It may here be noticed that, when once the price has been fixed pursuant to the act, the purchasing corporation is compellable to complete the purchase.(*o*)

§ **346**. The second class of cases embraces those contracts which are substantially for the sale of the property in question at a fair price, the mode of ascertainment, though indicated by the contract, being subsidiary and non-essential; and where consequently, if that mode of ascertainment has failed, the court will have recourse to some other means of coming at the fair price and of thus carrying into effect the contract in its essential parts.[1] As already remarked these cases are principally of the valuation of incidental matters and not of the principal subject-matter of the contract.

§ **347**. Grant, M. R., not only indicated, in his judgment in Milnes v. Gery,(*p*) the distinction of the two classes of

(*l*) Morgan v. Milman, 3 De G. M. & G., 24.
(*m*) Firth v. Midland Railway Co., L. R. 20 Eq., 100.
(*n*) Wycombe Railway Co. v. Donnington Hospital, L. R. 1 Ch., 268.
(*o*) Harding v. Metropolitan Railway Co., L. R. 7 Ch., 154; supra, § 112.
(*p*) 14 Ves., 400.

[1] Smith v. Peters, L. R., 20 Eq., 511; Whitlock v. Duffeld, 1 Hoffm. Ch., 110; Vandoren v. Robinson, 16 N. J. Eq., 110.

cases, but in two other cases before him acted upon it. In the earlier, in consequence of the lunacy of the vendor, the valuers could not be nominated; but the master of the rolls did not consider this an insurmountable difficulty, saying that, "if there was a valid and binding contract, the supervening incapacity of one party cannot deprive the other of the benefit;" and he accordingly directed an issue as to the lunacy, as a preliminary step in the cause.(*q*) In the other case, there was a contract to grant a lease, to contain such conditions as A. B. should think reasonable and proper; and his honor referred it to the master to settle the lease, and not to A. B.—considering the agency of A. B. not to be of the essence of the contract, and that the court would not grant relief through the medium of a reference compulsory on the other party.(*r*) And so in a case before Stuart, V. C., where there was a contract to sell land and bleachworks at a sum fixed, and the plant and machinery to be taken at a value to be ascertained by valuers to be appointed by the parties, it was held that this was a subsidiary stipulation only, and that it did not form an obstacle to specific performance, which was accordingly decreed, with costs.(*s*) The same view was taken both by Stuart, V. C., and on appeal by Lord Hatherley in a case where the main subject of the contract was the sale of an estate for £24,000, and a provision was inserted for the valuation of certain furniture and articles;(*t*) and in another case where a partnership contract contained a provision for a valuation at its expiration, which fell through from there being no provision as to an umpire, the court ascertained the value.(*u*) The main object of the contract there was the partnership; the defendant had had the benefit of that contract, and could not be allowed to escape from the subsidiary contract as to sale on the ground of the difficulty as to the valuation.

§ **348**. In another case before Stuart, V. C., he remarked that, where possession is referable to a contract to give a fair consideration, the amount of which has not been settled, the court will, in favor of possession and expenditure referable

(*q*) Hall v. Warren, 9 Ves., 605.
(*r*) Gourlay v. Duke of Somerset, 19 Ves., 429.
(*s*) Jackson v. Jackson, 1 Sm. & G., 184; Paris Chocolate Co. v. Crystal Palace Co., 3 Sm. & G., 119, 123. As to the way in which referees as to price ought to proceed, and on what grounds they may determine, see Eads v. Williams, 4 De G. M. & G., 674.
(*t*) Richardson v. Smith, L. R. 5 Ch., 648.
(*u*) Dinham v. Bradford, L. R. 5 Ch., 519.

to this contract, endeavor by every means within the legitimate bounds of its jurisdiction to ascertain the amount of the consideration.(*v*)

§ **349**. (4) It is, of course, essential to the completeness of the contract, that it should express not only the names of the parties, the subject-matter, and the price, but all the other material terms. What are, in each case, the material terms of a contract, and how far it must descend into details to prevent its being void as incomplete and uncertain, are questions which must, of course, be determined by a consideration of each contract separately. It may, however, be laid down that the court will carry into effect a contract framed in general terms, where the law will supply the details;(*w*) but if any details are to be supplied in modes which cannot be adopted by the court, there is then no concluded contract capable of being enforced.(*x*)

§ **350**. Though it may be impossible to define what is the necessary completeness in the terms of a contract, it is easy to give instances in which contracts have been held insufficient in this respect. Such was the case where it was not stated from what time an increased rent was to commence;(*y*) where the contract did not state, either directly or by reference, the length of the term to be granted;(*z*) where a contract for a lease for lives neither named the lives nor decided by whom they were to be named;(*a*) where an auctioneers's receipt was set up as a contract, but it did not refer to the conditions of sale, or show the proportion which the deposit was to bear to the price;(*b*) where there was a term as to the expenses which was not settled by the contract;(*c*) where there was a contract for a partnership, which defined the term of years, but was silent as to the amount of capital and the manner in which it was to be pro-

(*v*) Meynell v. Surtees, 3 Sm. & Gif., 101, 113; affirmed, 1 Jur. N. S., 737; 3 W. R., 535. See, also, Cheslyn v. Dalby, 2 Y. & C. Ex., 170.

(*w*) In Hampshire v. Wickens (7 Ch. D., 555), the power of the court to enforce a contract to accept a lease "to contain all usual covenants and provisions" appears to have been admitted. Cf. Haines v. Burnett, 27 Beav., 500; Kendall v. Hill, 6 Jur. N S., 968; Poyntz v. Fortune, 27 Beav., 393; Blakeney v. Hardie, I. R. 8 Eq., 381; and consider Guillamore v. Peacocke, 12 Ir. Ch. R., 354, 360.

(*x*) See South Wales Railway Co. v. Wythes, 5 De G. M. & G., 888; Ridgway v. Wharton, 6 H. L. C., 285; Rummens v. Robins, 3 De G. J. & S., 88; infra, § 361.

(*y*) Lord Ormond v. Anderson, 2 Ball. & B., 363.

(*z*) Clinan v. Cooke, 1 Sch. & Lef., 22; Gordon v. Trevelyan, 1 Pri., 64; Bayly v. Fitzmaurice, 8 El. & Bl., 664.

(*a*) Wheeler v. D'Esterre, 2 Dow, 359. But query whether the lessee cannot name the lives when the contract is silent. See, also, Lord Kensington v. Phillips, 3 Dow, 61.

(*b*) Blagden v. Bradbear, 12 Ves., 466.

(*c*) Stratford v. Bosworth, 2 V. & B., 341.

vided : (*d*)[1] and where a document showed the amount of rent to be paid by a party to a mining enterprise, but was silent as to other terms.(*e*)

§ **351**. Contracts are often incomplete from their reserving some matter for future agreement ; unless, perhaps, in cases where, in the absence of such agreement, the law determines the matter,(*f*) such contracts are necessarily incomplete until the further agreement has been come to. A contract to contract is nothing.

§ **352**. Where the contract provides for the determination of any material thing by some third person, and this has not been done, the contract is in the same predicament as when the price has been neither expressed in the contract nor ascertained. Cases have occurred where buildings or works have been stipulated to be done in such manner as a third person may direct, and where such direction has either been refused or not given ; and in these cases specific performance has been refused.(*g*)

§ **353**. Besides the express terms of the contract, there are others which, in the absence of any expression to the contrary, are implied by law.(*h*) With regard to such terms, therefore, whether they be necessary terms or not, the silence of the contract does not render it incomplete. thus a contract to sell property described merely as cottages and land purchased by the vender of persons named was construed as referring to, and importing the sale of, the whole of the vendor's interest.(*i*) A contract to sell a house simply implies that the interest sold is the fee simple;(*j*) and a contract to renew is presumed to be for the same term as the preceding lease.(*k*)

(*d*) Downs v. Collins, 6 Ha., 418.
(*e*) Caddick v. Skidmore, 2 De G. & J., 52.
(*f*) Hall v. Conder, 2 C. B. N. S., 22.
(*g*) Tillett v. Charing Cross Bridge Co., 26 Beav., 419; Earl of Darnley v. London, Chatham and Dover Railway Co., 3 De G. J. & S., 24 (cf. S. C., 1 Id , 204; L. R. 2 H. L., 43).
(*h*) The elements of all contracts have, by some jurists, been placed in three classes: 1st, those things which are essential, without which the contract cannot exist; 2d, those which are of the nature but not of the essence of the contract, being implied in it unless expressly excluded, but capable of being thus excluded without subverting the contract; and, 3d, the things that are accidental. The terms in question correspond, of course, with the second of these classes. Pothier, Tr. des Oblig., Part I, chap. 1, sect. 1, art. 1, § 3.
(*i*) Bower v. Cooper, 2 Ha., 408.
(*j*) Hughes v. Parker, 8 M. & W., 243.
(*k*) Price v. Assheton, 1 Y. & C. Ex , 82.

[1] Baker v. Glass, 6 Munf., 212, is a case in point. There, a contract for the sale of land, by which the vendor agreed to take, in part payment, a house and lot of the vendee at its cash value, to be fixed by two persons, and the parties agreed to appoint such persons, but not within any specified time, and never did so, was held to be too incomplete to be enforced in equity.

§ **354**. In every contract for the sale of land, a condition is implied for a good title,(*l*) and for the delivery up of the deeds; so that where this was prevented by the accidental destruction of the deeds subsequent to the contract, it was held that the vendor could not enforce the sale.(*m*) The title to be shown, of course, varies according to the nature of the property to be sold;(*n*) in the case of the sale of a lease, it formerly included the title of the lessor,(*o*) except in the case of a bishop's lease.(*p*) But by the vendor and purchaser act, 1874,(*q*) it has been provided that under a contract to grant or assign a term of years whether derived or to be derived out of a freehold or leasehold estate the intended lessee or assign shall not be entitled to call for the title to the freehold; and by the same act certain other provisions of a kind very common in contracts of sale are, in the absence of stipulation to the contrary, made implied terms in contracts for the sale of land.

§ **355**. The terms entitling a purchaser to title are conditions for the benefit of the purchaser, and may accordingly be waived by him, though the vendor may desire to insist on them as a ground for discharging himself from the contract.(*r*)[1]

§ **356**. On principle there seems much in favor of the view, that a contract for an under lease implies that the sublessee is to be subject to all the covenants in the superior lease, and it is not unsupported by authority.(*s*) But it has been determined that this implication can only arise where

(*l*) Doe d. Gray v. Stanion, 1 M. & W., 695, 701; Worthington v. Warrington, 5 C. B., 635.

(*m*) Bryant v. Busk, 4 Russ., 1.

(*n*) Curling v. Flight, 6 Ha., 41; S. C., 2 Ph., 613.

(*o*) Fildes v. Hooker, 2 Mer., 424; Souter v. Drake, 5 B. & Ad., 992; Hall v. Betty, 4 Man. & Gr., 410. As to the contract for the sale of a contract for a lease, see Kintrea v. Preston, 25 L. J. Ex., 287; and see infra, § 1318.

(*p*) Fane v. Spencer, 2 Mer., 430, n.

(*q*) 37 and 38 Vict., c. 78.

(*r*) Bennett v. Fowler, 2 Beav., 302.

(*s*) Cosser v. Collinge, 3 My. & K., 283; Smith v. Capron, 7 Ha., 185; Grosvenor v. Green, 7 W. R., 140; cf. Collins v. Stutely, id., 710.

[1] Unless the vendee expressly assumes the risk as to title, although no provision is made in the contract for a covenant of warranty to be inserted in the deed, if the vendor cannot give a good title, equity will not, as a general rule, decree its specific performance. Bates v. Delavan, 5 Paige, 299; Watts v. Waddle, 1 McLean, 200. And not only must the title not be a defective one, but it must be such an one as the vendor covenanted to convey. Tomlin v. McCord, 5 J. J. Marsh., 135; Jarman v. Davis, 4 Monr., 115. But where a person agreeing to sell lands has a good title, and was able to convey at the time of the bargain entered into, and no delay can be imputed to him in performing his part of the contract, the contract is considered in equity as then executed; the subsequent conveyance being only matter of form, the substance being the bargain. Ray v. McCulloch, Conf. Cam. & Nor., 492.

the purchaser had a fair opportunity of ascertaining for himself the provisions of the original lease;(*t*) and if the contract were silent, and unusual provisions were found in the head lease, the court would probably not enforce specific performance on the ground of the implication referred to.(*u*) Possession taken by the intended lessee is a strong circumstance to fix him with an acceptance of the terms of the head lease.(*v*) But it is not conclusive, and the circumstances under which the possession was taken may deprive it of this effect.(*w*)

§ **357**. The question whether or no there is an implication in executory contracts in favor of the insertion in the executed contract of all such stipulations as are usually inserted in such contracts, appears one still open in our law.(*x*)

§ **358**. An implied term may, of course, be rebutted by the contract or conditions of sale; as where they limit the title to be deduced, or provide that the purchaser shall simply take the vendor's interest.(*y*) And further, although an express term of a contract is in nowise affected by notice,(*z*) yet notice is sufficient to rebut the presumption of an implied term; for that is something not growing out of the contract itself, but given by law, and a matter therefore not of contract but of notice.(*a*) So that, for instance, where a purchaser has notice that the vendor is only a lessee, he cannot insist on the implication which might otherwise arise, that the contract is for the fee.(*b*)

§ **359**. Again, a material term may well be supplied by construction or inference where the circumstances justify it; but if neither supplied by expression, construction, nor inference, the contract is incapable of performance. Thus, a contract for the grant of a term of years may be construed to be for a term of years commencing from the date which the memorandum of the contract bears;(*c*) but where the contract is either undated, or there are stipulations for things to be done before the commencement of the term, which show that the date of the contract could not be in-

(*t*) Hyde v. Warden, 3 Ex. D., 72.
(*u*) Flight v. Baslin, 3 My. & K., 282.
(*v*) Cosser v. Collinge; Smith v. Capron, ubi supra.
(*w*) Hyde v. Warden, ubi supra.
(*x*) Ricketts v. Bell, 1 De G. & Sm., 335, where the question was much discussed by Knight Bruce, V. C. Cf. Blakeney v. Hardie, I. R. 8 Eq., 381.
(*y*) Freme v. Wright, 4 Mad., 364.
(*z*) Barnet v. Wheeler, 7 M. & W., 36
(*a*) Ogilvie v. Foljambe, 3 Mer., 53, 64.
(*b*) Cowley v. Watts, 17 Jur., 172.
(*c*) Doe d. Phillip v. Benjamin, 9 A. & E., 644; Hersey v. Giblett, 18 Beav., 174; Jaques v. Millar, 6 Ch. D., 153. See, too, Wesley v. Walker, 26 W. R., 368.

tended to be the commencement of the term, there the contract is incomplete, because a material item in it is entirely wanting.(*d*)

§ **360**. Where A., being lessee of a house and shop for the unexpired residue (fifty-nine years) of a term of eighty years, agreed to sub-let the premises to B. (who did not know the nature of A.'s interest) at a fixed yearly rent, but the duration of the under-lease was not specified in the contract, and B. went into and remained in possession, and laid out money in improving the premises, and ultimately, when the head lease had still twenty years to run, brought his action for specific performance of the contract; it was held, by Bacon, V. C., that B. was entitled to an under-lease for the whole of the residue of the term, less one day; and the court of appeal affirmed the plaintiff's right to an under-lease of defined duration, though they varied the vice-chancellor's decision by directing A. to grant an under-lease for the residue of the term, less one day, if the plaintiff should so long live.(*e*)

(*d*) Elore v. Sutton, 3 Mer., 237 (where it does not appear that the memorandum bore any date); Nesham v. Selby, L. R. 13 Eq., 191; 7 Ch., 406; Cartwright v. Miller, 36 L. T., 398. See, too, Southern v. Harriman, 14 W. R., 487; reversing S. C., 12 W. R., 704; Dolling v. Evans, 15 W. R., 394.

(*e*) Kusel v. Watson, 11 Ch. D., 129. Cf. Browne v. Warner, 14 Ves., 156; Re King's Leasehold Estates, L. R. 16 Eq., 521; Wood v. Beard, 2 Ex. D., 30.

CHAPTER IV.

OF THE UNCERTAINTY OF THE CONTRACT.

§ **361**. It is obvious that an amount of certainty must be required in proceedings for the specific performance of a contract greater than that demanded in an action for damages. For to sustain the latter proceeding, the proposition required is the negative one, that the defendant has not performed the contract—a conclusion which may be often arrived at without any exact consideration of the terms of the contract; whilst in proceedings for specific performance it must appear not only that the contract has not been performed, but what is the contract which is to be performed. It is, perhaps, impossible to lay down any general rule as to what is sufficient certainty in a contract; but it may be safely stated that the certainty required must be a reasonable one, having regard to the subject-matter of the contract,(*a*)[1] and the circumstances under which and with

(*a*) See Arist. Eth. Nic. lib. i., c. 3.

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[1] Notwithstanding the terms of a contract are general, yet equity will enforce it if the law supplies the details; but it will not do so if details are omitted which the law cannot adopt. Ridgway v. Whorton, 6 House of Lords, 285; Nichols v. Williams, 22 N. J. Eq., 63; Tiernan v. Gibney, 24 Wis., 190; Clark v. Clark, 49 Cal., 586; Riley v. Farnsworth, 116 Mass., 223; Picket v. Merchants' Nat. Bank, 32 Ark, 346. An agreement did not call for a deed with full covenants. Held, that the vendee was only entitled to a good deed to convey the title in fee simple. Lounsberry v. Locander, 25 N. J. Eq., 554; Thayer v. Torry, 37 N. J. Law, 339.

Agreement to convey good title.] A covenant to convey a "good title," does not necessarily entitle the party to a warrantee deed, a "good title" being effectually vested in him by a quit claim deed. Gazeley v. Price, 16 John., 267; Potter v. Tuttle, 22 Conn., 512; Kyle v. Kavanaugh, 103 Mass, 356; *contra*, Hoback v. Kilgores, 26 Gratt., 442.

Tax assessments.] The vendee is liable for tax assessments levied subsequent to the sale, where real property is sold, and a title bond given. Hall v. Denckla, 28 Ark., 506.

Time of completion may be implied.] This may be done from the nature or condition of the subject-matter of the contract. McKay v. Carrington, 1 McLean, 59; Hoyt v. Tuxbury, 70 Ill., 391.

Contract to convey land; rule as to certainty.] The certainty required for the specific performance of an agreement to sell land, refer's as well to the description of the property as to the estate to be conveyed. O'Brien v. Pentz, 48 Md.,

562; Shriver v. Sciss, 49 id., 384; Shakspeare v. Markham, 10 Hun, 311; Cox v. Cox, 59 Ala., 591.

Precision in contracts.] The following cases should be consulted under this head: Colson v. Thomson, 2 Wheat., 336; Carr v. Duval, 14 Pet., 77; Kendall v. Almy, 2 Sumn., 278; Bowen v. Waters, 2 Paine, 1; Morrison v. Rossignol, 5 Cal., 64; Minturn v. Baylis, 33 Cal., 129; Miller v. Cotton, 5 Ga., 341; Fitzpatrick v. Beatty, 6 Ill. (Gilm.), 454; Burk v. Creditors, 9 La. An., 57; McMurtrie v. Bennette, Harr. Ch. (Mich.), 124; Montgomery v. Norris, 2 Miss. (How.), 499; Rockwell v. Lawrence, 6 N. J. Eq. (2 Halst.), 190; Lockerson v. Stillwell, 13 N. J. Eq. (2 Beas.), 257; Waters v. Brown, 7 J. J. Marsh., 123; Goodwin v. Lyon, 4 Port. (Ala.), 297; Madeira v. Hopkins, 12 B. Mon., 593; Graham v. Call, 5 Munf., 396; Aday v. Echols, 18 Ala., 353; Sheid v. Stamps, 2 Sneed. (Tenn.), 172; Agard v. Valencia, 39 Cal., 292; Talman v. Franklin, 3 Duer, 395; Lobdell v. Lobdell, 36 N. Y., 327; Wiswell v. Teft, 5 Kans., 263; Long v. Duncan, 10 id., 294; Johnson v. Johnson, 16 Minn., 512; Hardesty v. Richardson, 44 Md., 617, Hyde v. Cooper, 13 Rich. Eq., 250; McKibbin v. Brown, 14 N. J. Eq., 13; Welsh v. Bayard, 21 id., 186; Huff v. Shepherd, 58 Mo., 242; Roundtree v. McLean, Hempst., 245; Lloyd v. Wheatley, 2 Jones, 267; Duvall v. Myers, 2 Md. Ch., 401; Wadsworth v. Manning, 4 id., 59; Clark v. Rochester R. R. Co., 18 Barb., 350; Wright v. Wright, 31 Mich., 380; Odell v. Morin, 5 Oregon, 96; Mehl v. Van der Walleke, 2 Lans., 267; Fott v. Webb, 59 Barb., 38; Munsel v. Loree, 21 Mich., 491; McClintock v. Laing, 22 id., 212; Allen v. Webb, 64 Ill., 342; Buckmaster v. Thompson, 36 N. Y., 558; Bowman v. Cunningham, 78 Ill., 48; Schmeling v. Hiesel, 45 Wis., 325; Blanchard v. Detroit R. R. Co., 31 Mich., 44; Carson v. Percy, 57 Miss., 97; Matterson v. Scofield, 27 Wis., 671; Reynolds v. O'Neil, 26 N. J., 223; Ring v. Ashworth, 3 Iowa, 452; Cornell v. Mulligan (21 Miss.), 13 Smeed. & Marsh., 388.

Examples of sufficient description of land.] "Land, whereon the vendor resides." "The D. G. Roe farm." This is sufficient, provided it can otherwise be sufficiently identified. Simmons v. Spenill, 3 Jones' Eq., 9. "Land lying on the southwest side of Black river, adjoining land of Wm. Hoffland and Martial." Kitchen v. Herring, 7 Ired. Eq., 190. "Land lately bought by A. from B., to wit: a part bounded by the section line running from the northeast corner of said tract to the stake put by C. on the southeast; thence in a due northeast course until it strikes the main road; thence along the said road, then it strikes the northern line of said tract; thence to the beginning." Hooper v. Laney, 39 Ala., 338. Land was located on the south side of a river in a deed, referring to a patent which placed the land on the west side of such river. The identity sufficiently appearing—Held, that the discrepancy was immaterial, Munson v. Davis, 20 Tex., 419. The town in which the land lies need not, of necessity, be stated. Robeson v. Hoonbacker, 3 N. J. Eq., 2 Green, 60. A contract of conveyance described a right of way, in which the length of the way was not stated; the terminal points were given, and the line of way so fixed as to be readily determinable by the government surveys. Held, sufficient. Puttman v. Haltey, 24 Iowa, 425. The grantor agreed to convey a right of way eighty feet wide over a tract of land, and the grantee subsequently entered and laid out his road with the acquiescence of the grantor. Held, that the contract was sufficiently definite, and that specific performance would be enforced in equity. Purinton v. Northern Ill. R. R. Co., 46 Ill., 297.

Examples of insufficient description of land.] "That a house should be put in repair, and handsomely decorated." Taylor v. Partington, 7 De G. M. & G., 328. "The necessary land for making a railway through the estate." Pearce v. Watts, L. R., 20 Eq., 492. The contract recited that a definite sum was to be paid, on a given day, for 120 acres of land in Shannon county, Mo., provided it shall not have been sold before that time. Miller v. Campbell, 52 Ind., 125; see, also, Lynes v. Hayden, 119 Mass., 482. For the sale of the houses in Smithfield street, without other description, or disclosing to whom they belonged. Hammer v. McEldomney, 46 Pa. St., 334. A. subscribed $50, and a lot to build upon, for the purpose of building a church, without stating the extent or boundaries of the lot. Church of the Advent v. Farrow, 7 Rich. Eq., 378. These were all held to be too indefinite to be enforced. The following cases should be consulted under this head: Camden and Amboy R. R. Co. v.

regard to which it was entered into.(*b*)[1] Thus, in one case, where there was a contract between two railway companies,

(*b*) Marsh v. Milligan, 3 Jur. N. S., 979; (Wood, V. C.)

Stewart, 18 N. J. Eq., 489; McGuire v. Stevens, 42 Miss., 724; Whelan v. Sullivan, 102 Mass , 204; Ellis v. Deadman, 4 Bibb., 467; Johnson v. Craig, 21 Ark., 533; Jordan v. Fay, 40 Me., 130; Graham v. Hendren, 5 Munf., 185; Parish v. Koons, 1 Pars. Eq. (Pa.) Sel. Cas., 79; Jordon v. Deaton, 23 Ark., 704; Ferris v Irving, 28 Cal., 645; Millard v. Ramsdell, Harr. (Mich.), 373; Shelton v. Church, 10 Mo., 774; Prater v. Miller, 3 Hawkes. 628; Copps v. Holt, 5 Jones' Eq., 153; Patrick v. Horton, 3 W. Va., 23; Taylor v. Ashley, 15 Texas, 50; Brakin v. Hambrick, 25 id., 408; Dobson v. Litton, 5 Coldw. (Tenn.), 616; Reynolds v. Warring, You., 346; Day v. Griffith, 15 Iowa., 104; Gelston v. Sigmund, 27 Md., 334; Nichols v. Williams, 22 N. J. Eq., 63; Grace v. Demison, 114 Mass., 16; Martin v. Halley, 61 Mo., 196; Carr v. Passaic Land Co., 22 N. J. Eq., 85; Soles v. Hickman, 20 Pa. St., 180; Kemble v. Kean, 6 Sim., 333; Franks v. Martin, 1 Ed., 309. In Launderson v. Cockermouth R. R. Co., 11 Beav., 497; White v. Herman, 51 Ill., 243, the courts held that they would endeavor to put a reasonable interpretation upon vague expressions in an agreement.

[1] Where the terms of a contract are indefinite or uncertain, specific performance will not be decreed. McMurtie v. Bennett, Harring. Ch., 124; Millard v. Ramsdill, id., 373; Colson v. Thompson, 2 Wheat., 336; Walton v. Coulson, 1 McLean, 120; Kendall v. Almy, 2 Sumn., 278; Carr v. Duval, 14 Pet., 79; Prater v. Miller, 3 Hawkes, 628; Waters v. Brown, 7 J. J. Marsh., 123; Fitzpatrick v. Beatty, 1 Gilm., 454; Goodwin v. Lyon, 4 Porter, 297. So where a tenant, holding by a lease under seal, in consequence of a diminution of value in the leasehold property, was about to leave, and the lessor told him that if he would stay he would reduce the rent, without specifying how much, it was held to be so uncertain that equity could not relieve the tenant. Smith v. Ankrim, 1 S. & R., 39. Neither will a contract, to convey a quantity of any land which the obligor may own, be specifically enforced. A specific performance will be decreed only where a specific thing is to be conveyed. Shelton v. Church, 10 Mis., 774. And specific performance of a verbal contract, which is executory and depends on a future event which may never happen, will not be decreed. Bradley v. Morgan, 2 A. K. Marsh., 369. It seems that the rule, that a specific performance will be refused where the contract is vitiated by uncertainty, is applied with more than ordinary stringency against assignees and representatives of the contracting parties. Kendall v. Almy, 2 Sumn., 178; Montgomery v. Norris, 1 How. (Miss.), 499. Though specific performance will not be decreed of a contract uncertain in its terms, yet if the agreement may be made certain, by means of references furnished by the contract, it will be enforced. Prater v. Miller, 3 Hawkes, 628. And in Wiswall v. McGowan, 1 Hoff. Ch., 126, it is said that where a contract refers to the subject-matter by vague and insufficient description, the defect may be supplied by other documents, coming from, or adopted by, the party against whom the contract is to be enforced, pending and connected with the transaction. It will be no objection to decreeing specific performance of a part of a contract, that another part is uncertain. So, where A. purchased property of B. at a low price, and agreed to give the children of B. the benefit of it, on being repaid the purchase money and interest, no uncertainty existing in respect to that part of the agreement which provided for the conveyance to the children of B., the court had no difficulty in decreeing performance of that part of the contract, notwithstanding that another portion of the contract was indefinite. Sarter v. Gordon, 2 Hill. Ch., 121. In Andrews v. Andrews, 28 Ala., 432, the objection of uncertainty in the terms of the contract being raised, the court held, that while great certainty and precision in contracts were indispensable prerequisities to their specific performance, in view of the looseness and inaccuracy of the language, which showed that the parties and witnesses were uneducated, and construing the inartificial expressions of the parties by their subsequent declarations, showing the meaning which they attached to the words, the terms of the contract were sufficiently certain.

that the one should have the right of running with their engines, carriages and trucks, and carrying traffic upon the line of the other, Parker, V. C., held that this was not too uncertain to be enforced.(*c*) "It means," he said, "a reasonable use—a use consistent with the proper enjoyment of the subject-matter, and with the rights of the granting party."(*d*) And we have already seen that where the terms of the contract are general, but the details are such as the law will supply, the contract will not be considered as objectionable for vagueness and uncertainty.(*e*) In one case a contract by a railway company with a landowner, to make such roads, ways and slips for cattle as might be necessary, was held not incapable of being performed by the court; but it is to be observed that in this case the company had entered and made the railway.(*f*) In another case, where a rector had agreed to grant a lease of his glebe, "except thirty-seven acres thereof" (which were not specified), Lord Romilly, M. R., held that the contract was not void for uncertainty, inasmuch as the lessor had a right to select the thirty-seven acres at any time before the execution of the lease. His lordship held, however, that this right must be so exercised as not to interfere with the lessee's beneficial enjoyment of the lands included in the lease.(*g*)

§ **362**. Where the terms of the contract are originally uncertain, but the contract has been acted on, and a user and course of dealing have existed between the parties which gives certainty to what was originally uncertain, the court has, in some cases, had regard to this as removing the original difficulty.(*h*)

§ **363**. The mere fact of indefinite words, such as "*et cætera*," being used in a contract does not necessarily make it too uncertain for performance. Such words may be understood with sufficient certainty by reference to the words to which they are added and the surrounding facts of the case.(*i*) Again, where, by the contract for a lease, the ten-

(*c*) Great Northern Railway Co. v. Manchester, Sheffield and Lincolnshire Railway Co., 5 De G. & Sm., 138.

(*d*) 5 De G. & Sm., 149.

(*e*) Per Turner, L. J., in South Wales Railway Co. v. Wythes, 5 De G. M. & G., 888; supra, § 349.

(*f*) Saunderson v. Cockermouth and Workington Railway Co., 11 Beav., 497; affirmed by Lord Cottenham. See Parker v. Taswell, 4 Jur. N. S., 183 (Stuart. V. C.); S. C., 2 De G. & J., 559, and supra, § 318.

(*g*) Jenkins v. Green (No. 1), 27 Beav., 437; and see supra, § 329.

(*h*) Oxford v. Provand, L. R. 2 P. C., 135. See, also, Laird v. Birkenhead Railway Co., Johns., 500.

(*i*) Cooper v. Hood, 26 Beav., 293; Powell v. Lovegrove, 8 De G. M. & G., 357; Parker v. Taswell, 2 De G. & J., 559.

ant was to do certain specified works, and "other works upon the property, at a total estimated cost of about £150, and the specified work were such as would evidently cost nearly that sum, the court considered the "other works" to be of such a trifling description that their being left undefined was not a ground for refusing specific performance.(*j*)

§ **364**. On the ground of uncertainty, the court has refused specifically to perform marriage articles prepared by a Jewish rabbi in an obscure form, said to prevail amongst German Jews;(*k*) also, a contract for the sale of land, where there was a doubt as to the identification of a plan to be incorporated into the contract.(*l*) In another case the court refused to interfere in respect of an engagement by the defendant, Mr. Kean, to perform at a theatre.(*m*) "Independently of the difficulty of compelling a man to act," said Shadwell, V. C., "there is no time stated, and it is not stated in what character he shall act; and the thing is altogether so loose that it is perfectly impossible for the court to determine upon what scheme of things Mr. Kean shall perform his agreement."(*n*)[1] And where a vendor had agreed to sell an estate with a reservation of "the necessary land for making a railway through the estate to Prince Town," Jessel, M. R., held that the contract could not be enforced by the purchaser.(*o*)

§ **365**. So, again, where the contract is discrepant with itself, or there are two different contracts relating to the same subject-matter, the court will generally refuse specific performance.(*p*) In a case,(*q*) where an offer was made to

(*j*) Baumann v. James, L. R. 3 Ch., 508.
(*k*) Franks v. Martin, 1 Eden, 309.
(*l*) Hodges v. Horsfall, 1 Russ. & M., 116. Distinguish Naylor v. Goodall, 26 W. R., 162.
(*m*) Kemble v. Kean, 6 Sim., 333. Cf. Ghillis v. McGhee, 13 Ir. Ch. R., 48.
(*n*) 6 Sim., 337.
(*o*) Pearce v. Watts, L. R. 20 Eq,, 492.
(*p*) Callaghan v. Callaghan, 8 Cl. & Fin., 374.
(*q*) Taylor v. Portington, 7 De G. M. & G., 328; cf. Norris v. Jackson, 1 J. & H., 319; Samuda v. Lawford, 4 Giff., 42; Gardner v. Fooks, 15 W. R., 388; Dear v. Verity, 17 W. R., 567.

[1] See Sanquirico v. Benedetti, 1 Barb. Sup. Ct. Rep., 315. In Hamblin v. Dinneford, 2 Edw. Ch., 529, where a theatrical performer had contracted to perform at one theatre, and at no other, the court refused to restrain him from performing at another theatre in violation of his agreement. Cases of this nature come strictly under the head of contracts to do personal acts; and although no line of distinction between contracts relating to property and agreements for personal services can be established to be of general utility, yet, where the contract has been strictly one to perform acts alone, there are but few cases in which they have been *actively* enforced. See Kemble v. Kean, 6 Sim., 333. In Sanquirico v. Benedetti, 1 Barb. Sup. Ct. Rep., 315, Edwards, J.,

take a house for a specific term and at a certain rent, if put into thorough repair, and stating also that the drawing rooms would be required to be handsomely decorated according to the present style, and making some further requirements as to painting, and the offer was accepted, the court of appeal in chancery, reversing the decision of Lord Romilly, M. R., dismissed the bill on the ground of the uncertainty imported into the contract by the expressions in the offer as to repairs. Where a contract was for the purchase of "the land required" for the construction of a railway, at so much per acre, and the contract contained provisions agreed on between the land agents of the company and the vendor as to roads, culverts, etc., etc., Lord Romilly, M. R. (following the decision of Turner, V. C., in Webb v. Direct London and Portsmouth Railway Co.,[r] then unreversed), held that a surveyor going upon the ground, and having the contract in his hand, could accurately ascertain the land to be taken, and that the terms of

(r) 9 Ha., 129; 1 De G. M. & G., 521.

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said, "Although there may be cases in which a court of equity will decree specific performance of a contract for personal services, still this is not one of that character. The difficulty, if not the utter impracticability, of compelling a specific performance of the contract set forth in the bill, is a conclusive reason why this court should refuse its interference." Walworth, Ch., in De Rivafinoli v. Corsetti, 4 Paige, 270, in representing the difficulties attendant upon the enforcing of contracts of this nature, says, "I am not aware that any officer of this court has that perfect knowledge of the Italian language, or possesses that exquisite sensibility in the auricular nerve which is necessary to understand, and to enjoy with a proper zest, the peculiar beauties of the Italian opera, so fascinating to the fashionable world. There might be some difficulty, therefore, even if the defendant was compelled to sing under the direction and in the presence of a master in chancery, in ascertaining whether he performed his engagement according to the spirit and intent. It would also be very difficult for the master to determine what effect coercion might produce upon the defendant's singing, especially in the livelier airs; although the fear of imprisonment would unquestionably deepen his seriousnessness in the graver parts of the drama." There are cases, however, where the court has interfered *negatively*, but they have been in the nature of a partnership. "Thus, in the case of a theatre considered as a partnership, a contract with the proprietors not to write dramatic pieces for any other theatre is valid, and a violation of it will be restrained by injunction. As was intimated by Lord Eldon in that case, it is not unreasonable that an actor and a writer for the stage should engage for the talents of each other; and that neither should write or act but for the theatre in which they are jointly interested." Willard's Eq. Jur., 277. But this *partnership* must exist between the parties; and, if there be none, "and the defendant has violated his engagement to one theatre, and formed a conflicting engagement with another, a court of equity will not interfere either *actively*, to compel performance of one contract, or *negatively*, to prevent the performance of the other." See the cases of Morris v. Coleman, 18 Ves., 437; Clark v. Price, 2 Wilson, 157; Waters v. Taylor, 15 Ves., 10; Ex parte Forde, 7 id., 617; Ex parte O'Reilly, 1 id., 112; Kemble v. Kean, 6 Sim., 333.

the contract were, therefore, sufficiently explicit; but this decision was overruled on appeal, and Knight Bruce, L. J., held the language "too vague, too uncertain, too obscure to enable this court to act with safety or propriety."(*s*) A contract to take the mines under lands of A. at B., B. being neither a township nor a parish, has also been held uncertain.(*t*)

§ **366.** In another case, where there was a contract in general terms for the construction of a railway according to the terms of a specification to be prepared by the engineer of the company for the time being, it was held too vague, obscure and uncertain to be enforced;(*u*) the like was held in the case of a contract to give the plaintiffs accommodation for the sale of their articles in the refreshment-rooms of the defendants, and to furnish them with the necessary appliances.(*v*) The like was again held where one partner proposed to sell to the other his share in the business, and that a large portion of his capital should remain in the business, but the writing did not state how much, for how long, or at what interest, and this proposal was accepted.(*w*) And again, where on the sale of a piece of land there were stipulations that, in the event of there being any coals or ironstone under the land, a royalty of so much per ton should be paid thereon by the purchaser to the vendor, and also that any mines required to be left by a certain railway company were to be paid for, as if the same had been gotten, out of the money to be received from the railway company; it was held, with regard to the latter stipulation, that it was incapable of being worked out, inasmuch as if the company bought the mines, the contingency whether there was any coal or ironstone under the land would remain undecided; and as to the former stipulation, that the parties seemed to have intended to work it out by a reservation of mines to the vendor, and a lease of them by the vendor to the purchaser, but that there was nothing to guide the court as to the stipulations to be included in such

(*s*) Lord James Stuart v. London and North Western Railway Co., 15 Beav., 513; S. C., 1 De G. M. & G., 721. Cf. Bellaney v Knight, 10 W. R., 289.

(*t*) Lancaster v. De Trafford, 31 L. J. Ch., 551.

(*u*) South Wales Railway Co. v. Wythes, 5 De G. M. & J., 880.

(*v*) Paris Chocolate Co. v. Crystal Palace Co., 3 Sm. & Gif., 119.

(*w*) Cooper v. Hood, 26 Beav., 293.

a lease, except the rates of royalty; and the court accordingly declined to enforce the contract for sale.(*x*)

§ **367**. The same certainty will not be required in cases where there is any element of fraud as in simple cases of specific performance of a contract. Thus where A. agreed with B. in effect that if B. would not try to buy a certain estate, A. would try to buy, and in case of success would cede a portion of the estate to B. at a certain price; and B. acted on his bargain and allowed A. to purchase; and A. having purchased refused to perform his part and set up the uncertainty of the part to be ceded; the court held that the defense could not avail and directed an inquiry to ascertain the portion to be given up and the price. It seems that if this could not have been ascertained, B. might have claimed the whole estate.(*y*)

(*x*) Williamson v. Wootton, 3 Drew., 210. See further as to uncertainty, Harnett v. Yielding, 2 Sch. & Lef., 549; Tatham v. Platt, 9 Ha., 660; Taylor v. Gilbertson, 2 Drew., 391; Holmes v. Eastern Counties Railway Co., 3 K. & J., 675; Sturge v. Midland Railway Co., 6 W. R., 233; Jeffery v. Stephens, 8 id., 427; Firth v. Ridley, 33 Beav., 516, supra, § 71.

(*y*) Chattock v. Muller, 8 Ch. D., 177.

CHAPTER V.

OF THE WANT OF FAIRNESS IN THE CONTRACT.

§ **368**. There are many instances in which, though there is nothing that actually amounts to fraud, there is nevertheless a want of that equality(*a*) and fairness in the contract which, as we have seen, are essential in order that the court may exercise its extraordinary jurisdiction in specific performance.[1] In cases of fraud(*b*) the court will not only not perform a contract, but will rescind it;[2] but there are many

(*a*) As to the equality which natural justice requires to find place in contract see Grotius, De Jure Belli ac Pacis, lib. ii, cap. 12, § 8, et seq.

(*b*) The jurisdiction to rescind is, of course, not confined to cases of actual fraud. See per James, L. J., in Torrance v. Bolton, L. R. 8 Ch., 124.

[1] No rule in equity is more clearly established than that upon an application for a specific performance of a contract, the court must be satisfied that the claim is reasonable and just, and the contract equal in all its parts; if these points be not established by the complainant, he will be left to his remedy at law. Modisett v. Johnson, 2 Black., 431; Seymour v Delancey, 3 Cow., 445; Cabeen v. Gordon, 1 Hill. Ch., 51.

[2] Agreements will also be decreed to be delivered up for cancellation upon the ground of surprise. Thus, in Willan v. Willan, 16 Ves., 72, which was a case concerning a lease with a covenant for perpetual renewal, at a fixed rent, of premises under a church, renewable upon fines continually increasing, neither party understanding the effect of their contract, the agreement was ordered to be canceled. Twining v. Morrice, 2 Bro. C C., 326, a case to the same effect, was quoted by Lord Elden, with approbation. And in America the principle there established has been received and acted upon Gillespie v. Moon, 2 John. Ch., 598; Seymour v. Delancey, 3 Cow., 445. There appears to have been a difference of opinion concerning the meaning which courts of equity attach to the word *surprise*, which we have just mentioned, as affording a ground of relief. See Eden, Injunc. (2d Am. ed), 21 and 27, notes. Mr Jeremy (2 Eq. Jur., ch. 2, p. 366) seems to suppose that there is something technical in its meaning Surprise, he says, "it seems is a term for the immediate result of a certain species of mistake, upon which this court will relieve." He also says that surprise is often used as synonymous with fraud; but that "they may, perhaps, be distinguished by the circumstance, that in instances to which the term fraud is applied, an unjust design is presupposed; but that in those to which surprise is assigned, no fraudulent intention is to be presumed In the former case, one of the parties seeks to injure the other; in the latter, both of them act under an actual misconception of the law." Mr. Justice Story seems to be of the opinion, that this explanation does not render the definition of Mr. Jeremy any clearer than it was before; and he proceeds to say, that, "there does not seem anything technical or peculiar in the word surprise, as used in courts of equity. The common definition of Johnson sufficiently explains its sense. He defines it to be the act of taking unawares; the state of being taken unawares; sudden confusion or perplexity. When a court of equity relieves on the ground of surprise, it does so upon the ground that the party has been taken unawares, that he has acted without due deliberation, and under con-

cases in which the court will stand still, and interfere neither for the one purpose nor the other.(*c*)[1]

§ **369**. The unfairness in question may be either in the terms of the contract itself, or it may be in matters extrinsic and the circumstances under which it was made; with regard to the latter, parol evidence is of course admissible.(*d*)[2]

(*c*) Per Lord Eldon in Willan v Willan, 16 Ves., 83. See Savage v. Taylor, Forr., 234; Twining v. Morrice, 2 Bro. C. C., 326; Savage v. Brocksopp, 18 Ves., 335; Davis v. Symonds, 1 Cox, 406; Redshaw v. Governor & Co of the Bedford Level, 1 Eden, 346.

(*d*) Davis v. Symonds, 1 Cox, 402

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fused and sudden impressions. The case of Evans v. Llewellyn, 2 Bro. Ch., 150, is a direct authority to this very view of the matter. There may be cases where the word surprise is used in its more lax sense, and where it is deemed presumptive of, or approaching to, fraud. (1 Fonbl. Eq. B., 1, ch. 2, § 8, p. 125; Earl of Bath and Montague's Case, 3 Ch. Cas., 56, 74, 103, 114.) But it will be always found that the true sense of it is, where something has been done, which was unexpected, and operated to mislead or confuse the parties on a sudden, and on that account has been deemed a fraud." Story's Eq. Jur., § 120, p. 135, note (1). It has been said that a decree in equity is seldom based upon the ground of surprise alone; and that there must be other circumstances of fraud or mistake connected with it in order to become a proper subject of equitable relief. This is probably erroneous. The basis of Lord Eldon's decree in Willan v. Willan was, that the parties were ignorant of the effect of their agreement. There was no *misunderstanding* in the case; but a total *lack of understanding*. Mutual misapprehension of *rights*, as well as the *effects* of the agreement, may properly furnish in some cases a ground of relief. For if both parties acted under a mutual misconception of their actual rights, they could not justly be said to have intended what they did. Story's Eq. Jur., § 123; Willan v. Willan, 16 Ves., 72; Anderson v. Smith, 1 A. K. Marsh., 51.

[1] Specific performance is a matter of judicial discretion, and not of arbitrary right; and a court of chancery may refuse to rescind a contract, where it would refuse to enforce a specific performance of it at the suit of the other party. It is not more binding upon the court to set aside every contract that it will not specifically perform, than to perform every contract which it will not set aside. St. John v. Benedict, 6 John. Ch., 111; Minturn v. Seymour, 4 id., 497; Seymour v. Delancey, 6 id., 222; Jackson v. Ashton, 11 Peters, 229; McNeil v. Magee, 5 Mason, 244; Howard v. Moore, 4 Sneed (Tenn.), 317; Acker v. Phœnix, 4 Paige, 305; Revell v. Hussey, 2 Ball & Bea., 288; Clitherall v. Olgivie, 1 Dessau., 257; Barker v. May, 3 J. J. Marsh., 436; Osgood v. Franklin, 2 John. Ch., 23.

[2] *New contract inconsistent with former one.*] A new contract was inconsistent with and rendered impossible of performance by a former one between the same parties. Held, that the first was rescinded, upon the principle that a subsequent act of the Legislature repeals a former act, the two being inconsistent. Paul v. Meservey, 58 Me., 419.

Written contract changed by presumption of a new contract.] Lord Eldon said, in Coust v. Harris, T. & R., 496, 523: "In ordinary partnership, nothing is more common than this, that though partners enter into a written agreement stating the terms upon which the joint concern is to be carried on, yet if there be a long course of dealing, or a course of dealing not long, but still so long as to demonstrate that they have all agreed to change the terms of the original written agreement, they may be held to have changed these terms by conduct." See, also, Geddes v. Wallace, 2 Bligh, 270, 297; Jackson v. Sedgwick, 1 Swanst., 460; Smith v. Jeyes, 4 Beav., 505.

New contract by parol; waiver of written.] Notwithstanding the original contract was in writing, a new contract may be made by parol, where there has been acts of part performance. Wallis v. Long, 16 Ala., 738; see, also, Hunt

§ **370**. The fairness of the contract, like all its other qualities, must be judged of at the time it is entered into, or at least when the contract becomes absolute, and not by subsequent events ;(*e*) for the fact that events, uncertain at the time of the contract, may afterwards happen in a manner contrary to the expectation of one or both of the parties, is no reason for holding the contract to have been unfair.[1] "The period," said the Irish Lord Chancellor Manners, "at which the court is to examine the agreement between the parties is the time when they contracted."(*f*)

§ **371**. In the case, however, of contracts to sell at a price to be fixed or any other condition to be performed before they become absolute, it may be urged that the time when the contract becomes absolute, and not the date of its signature, is the time to judge of its fairness. Unfairness in the valuation is certainly an objection.

§ **372**. The principle of judging of the fairness of a contract at its date applies to compromises and settlements of family and other questions. "Where parties whose rights are questionable, have equal knowledge of facts, and equal means of ascertaining what their rights really are, and they fairly endeavor to settle their respective rights amongst themselves, every court must feel disposed to support the conclusions or agreements to which they may fairly come at the time,(*g*) and that notwithstanding the subsequent discovery of some common error"(*h*) or a subsequent judicial decision showing the rights of the parties to have been different from what they supposed, or that one party had nothing to give up.(*i*)[2] And the uncertainty which may

(*e*) So as to hardship, see infra, § 398.
(*f*) In Revell v. Hussey, 2 Ball & B., 288. See infra, § 398.
(*g*) Cf. per Turner, L. J., in Williams v. Williams, L. R 2 Ch., 304; Bucknell v. Bucknell, 7 Ir. Ch. R., 130.
(*h*) Per Lord Langdale, M. R., in Pickering v. Pickering, 2 Beav , 56; Frank v. Frank, 1 Cas. in Ch., 84
(*i*) Lawton v. Campion, 18 Beav., 87.

v. Barfield, 19 id., 117; Adams v. Nichols, 19 Pick., 275. What are parol contracts ? A verbal contract, and a writing not under seal, is a parol contract; they are both on the same footing. A verbal contract is of as high a grade as a writing not under seal, and it may be released, abrogated, or modified by an agreement either written or verbal. Bishop v. Busse, 69 Ill., 403; Rhodes v. Thomas, 2 Carter (Ind.), 638; Linard v. Patterson, 3 Blackf., 353; Smith v. Addleman, 7 id., 119; Woodruff v. Dobbins, 7 id., 582.

[1] Therefore, fluctuations in the value of property, caused by events subsequent to the making of the contract, will be regarded by the court, if the contract be fairly entered into at the time. Low v. Treadwell, 3 Fairf., 441.

[2] Courts of equity will sustain agreements or compromises of this nature, upon grounds of public policy, provided that the conclusions of the parties have been fairly entered into, made with deliberation, and reasonable in themselves. Story's Eq. Jur., § 121; Pickering v. Pickering, 2 Beav., 31.

render a compromise fair, and therefore binding, may be either in some future and uncertain event, or the future ascertainment of some event past and therefore in itself certain, as, for instance, whether a son was legitimate or not,(*j*) or whether an uncle had made a particular will or not.(*k*)

§ 373. The principle just stated is, perhaps, most frequently illustrated by cases of family arrangement or of compromise; but it is applicable to contracts of whatsoever nature. The case of Parker v. Palmer,(*l*) which came before the court in the fourteenth year of Charles II, illustrates this. Parker, as it appears, had, during the commonwealth, sold a lease which he had from a dean and chapter for three lives, to Palmer, the price agreed on being £4,320. Subsequently the purchaser agreed with the vendor that, if he would abate him £420, he would reconvey the lease whenever the king and dean and chapter were restored. The abatement was made, the king and church were restored, and thereupon the vendor sued for a reconveyance, which was accordingly decreed by the then master of the rolls, and affirmed by Lord Clarendon and Sir Orlando Bridgeman. Again, where a man agreed to sell for £20 an allotment thereafter to be made to him under an inclosure, and it turned out to be worth £200, he was nevertheless compelled to perform his contract;(*m*) and so in a case before Leach, V. C., where he maintained a contract entered into without any fraud or concealment, by which one partner agreed with the retiring partner to give him £2,000 for the concern, though they knew the partnership to be insolvent, his honor said: "Suppose the case of a trade attended with great risk, one partner despairing, the other confident and willing to buy the share of his partner, and give him £2,000 for it; on what possible ground could this contract be invalidated?"(*n*) The cases in which the thing sold is described in general terms—as, for example, a manor—and the extent and value of it are at the time uncertain,(*o*) and also the cases in which the vendor only sells such interest in the property as he has, where that which

(*j*) Stapilton v. Stapilton, 1 Atk., 2.
(*k*) Heap v. Pong, 9 Ha., 90.
(*l*) 1 Cas in Ch., 42.
(*m*) Anon. before Jekyll, M. R, cited in Cooth v. Jackson, 6 Ves., 24.
(*n*) Ex parte Peake, 1 Mad., 355.
(*o*) Baxendale v. Seale, 19 Beav., 601.

is sold turns out differently from the purchaser's expectations are analogous to those before stated.(*p*)

§ **374**. But in order to bring a contract within the principle, the uncertainty as to the subject-matter of the contract must at the time of the contract have been a real one to both parties, either from the nature of things or from the state of knowledge of both parties. A contract entered into by one party who knows that the subject-matter of the contract does not exist with another who does not know, will not, it seems, be executed by the court, though its terms may be such as to put the ignorant party on his guard, and to throw the uncertainty on him. In one case, the particulars described the subject of the sale as the interest, if any, of Francis Norton in certain stock and also in a lease, and stated that there was a lien of £100 on the lease, and the conditions provided that even if it should appear that Francis Norton had no interest in the premises, the purchaser should have no remedy against the vendor to compel him to refund; in consequence of the state of certain partnership accounts which was known to the vendor, but which the purchaser had no means of ascertaining, the interest sold was of no value whatsoever, and was in fact only exposed to sale for the purpose of enabling certain proceedings to be taken against the separate estate of Francis Norton; the vendor made no representations as to the value, but received from the purchaser £150 as the purchase money; Lord Hatherley (then Wood, V. C.), set aside the sale at the suit of the purchaser, with costs against the vendor, on the ground that the purchaser was buying what might be worth nothing, while the vendor was selling what was worth nothing.(*q*)

§ **375**. Further, the principle in question will not apply where, though the terms of the contract may express an uncertainty, that uncertainty was not understood by the parties to comprise the event which actually happens. Thus where A. contracted with B. for the sale of a manor, and stipulated that he should not be obliged to define its boundary, and, the manor turning out to comprise a valuable property not before known to either party to be part of it,

(*p*) See infra, § 1287.

(*q*) Smith v. Harrison, 26 L. J Ch., 412; 5 W. R., 408

the purchaser, who had previously sought to repudiate the contract, filed his bill for performance, Lord Romilly, M. R., on consideration of the evidence, came to the conclusion that neither party intended to sell or buy a mere doubtful matter, and that both parties at the time of the contract believed that it included something different from what would then be conveyed to the plaintiff, if the conveyance were to be executed as he claimed it, and accordingly dismissed the bill, but without costs.(*r*)

§ **376**. In another case there was a farm which appears to have contained 181 acres, and had coal under it, which was known or believed to be traversed by a fault; the owners agreed to demise to A. the minerals under a portion of the farm which lay to the eastward of an upthrow fault to the east; the quantity was described as supposed to be 98 acres or thereabouts. There were to be a rent certain and royalties on the coal raised. It turned out that the fault left 173 instead of 98 acres to the east of it. The court of appeal in chancery thought it clear that of such a contract specific performance could not have been granted at the suit of the lessee.(*s*)

§ **377**. In contracts to sell at a price to be fixed by a third person, the court would no doubt consider the unfairness of the valuer's conduct as a bar to the right to specific performance. So in one case, where the court came to the conclusion that it was doubtful whether the valuation had been made with a due attention to accuracy, Lord Eldon refused specific performance of the contract to sell.(*t*)

§ **378**. In another case, where the amount of rent to be paid was referred to arbitrators and an umpire, one of the arbitrators so far misconducted himself as to rest his decision, not on his own judgment, but on the will of one of the parties interested, and the umpire proceeded on the footing of an outlay of money by the tenant for which the contract contained no stipulation, the House of Lords reversed a decree for specific performance pronounced by the Irish court of chancery.(*u*)

§ **379**. In another case, where the referees consulted the umpire and made their award as to the value of coal upon

(*r*) Baxendale v. Seale, 19 Beav., 601.
(*s*) Davis v. Shepherd, L. R. 1 Ch., 410.
(*t*) Emery v. Wase, 8 Ves., 505. Distinguish Collier v. Mason, 25 Beav., 200
(*u*) Chichester v. Macintire, 4 Bli. (N. S.), 78.

his estimate, though one at least of the referees thought it wrong, this circumstance was held fatal to the valuation and the suit.(*v*) Other objections were discussed, and it was held that the objection (1) that the valuers did not examine witnesses, and (2) that one of the valuers did not go down the mine but acted on the report of his grandson, were not sustainable; but another objection, that the valuers did not sign their award together, was held entitled to much weight though not determined to be valid. This case is a very instructive one as to the duty of referees or valuers.

§ **380**. In judging of the fairness of a contract, the court will look not merely at the terms of the contract itself, but at all the surrounding circumstances—such as the mental incapacity of the parties, though falling short of insanity,(*w*) their age or poverty, the manner in which the contract was executed, the circumstances that the parties were acting without a solicitor, that the property was reversionary, or that the price was not the full value.(*x*)[1]

§ **381**. Therefore whenever there are evidences of distress in the party against whom performance is sought,(*y*) or he is an illiterate person, or whenever there are any circumstances of surprise, or want of advice,(*z*) or anything which seems to import that there was not a full, entire and intelligent consent to the contract,(*a*) the court is extremely cautious in carrying it into effect. Still, it is not the doctrine of the court that a man cannot contract without his solicitor at his elbow,(*b*) or that a man in insolvent circumstances, or in prison, is disabled from selling his estate;

(*v*) Eads v. Williams, 4 De G. M. & G., 674.
(*w*) Clarkson v. Hanway, 2 P. Wms., 203; Gartside v. Isherwood, 1 Bro. C. C., 558; Bridgman v. Green, Wilm. Not., 58, 61. See supra, 261
(*x*) Bell v. Howard, 9 Mod., 302; Martin v. Mitchell, 2 J. & W., 413, 423; Stanley v. Robinson, 1 R. & M., 527.
(*y*) Kerneys v. Hansard, Coop., 125; Johnson v. Nott, 1 Vern., 271.
(*z*) Stanley v. Robinson, 1 R. & M., 527; Helsham v. Langley, 1 Y. & C. C. C., 175.
(*a*) The nature of the proper consent to a contract seems not incorrectly expressed in the following extract: "Consensus debet esse (1) verus seu internus et mutuus; (2) aliquo signo externo expressus; (3) liber et plene deliberatus; (4) serius, cum animo se obligandi." Mariani Examen, § 278.
(*b*) Lightfoot v. Heron, 3 Y. & C. Ex., 586; Haberdashers' Co. v. Isaac, 3 Jur. (N. S.), 611 (Wood, V. C.).

[1] Where a young man, just arrived at his majority, contracted for the purchase of land, after an examination utterly insufficient to ascertain its value, with a person who was more than a match for him, from his want of sagacity, experience and advice, and who described the advantages of the purchase in exaggerated terms, for a grossly inadequate price, the court refused to decree specific performance against him, although there was no fraud, nor any legal incapacity to contract on his part. Gasque v. Small, 2 Strobh's Eq., 72.

and if a contract made under such circumstances will bear the careful examination of the court and the full light of day, it will be specifically performed.(*c*)

§ **382**. It is enough, generally speaking, to induce the court to refuse performance, that there are any circumstances about the making of the contract which render it not fair and honest to call for its execution; it is not needful that there was any intentional unfairness or dishonesty at the time.(*d*) A leading case on this subject is Twining v. Morrice,(*e*) where the bill was by a purchaser against a vendor; at the sale, which was by auction, the solicitor, who was known to be the agent of the vendor, had made some biddings for the plaintiff, which, from his known relationship to the vendor, were thought to be the biddings of a puffer, and so damped the sale; the act was done in inadvertence by the solicitor; but as it was done at the plaintiff's instance, specific performance was refused by Lord Kenyon, M. R.

§ **383**. Unfairness arising from misstatements is considered under the head of misrepresentation;(*f*) and cases relating to the silence or suppression of a fact by one party are considered in the chapter on fraud.(*g*) But it seems possible that there may be cases where silence is not fraudulent, but yet creates such a case of hardship as prevents the interference of the court in specific performance. On this ground was put a case where a lessee obtained the renewal of a lease on the surrender of an old one, knowing and suppressing the fact, which was unknown to the lessor, that the person on whose life the old lease depended was *in extremis*, and the court declined to aid the lessee.(*h*) And in a case before Lord Cranworth, where the same solicitor acted for both parties, but did not disclose to both parties the whole nature of the dealing, or place his principals at arms' length in the transaction, the court refused to enforce specific performance at the suit of the purchaser.(*i*)

§ **384**. On the ground of want of fairness, the court will not assist one party to a contract specifically to enforce it against the other, who at the time of entering into it was in

(*c*) Brinkley v. Hann, Dru., 175.
(*d*) Mortlock v. Buller, 10 Ves., 292, 305.
(*e*) 2 Bro. C. C., 326.
(*f*) Infra, § 624, et seq.
(*g*) Part 3, ch. 13, § 676, et seq.
(*h*) Ellard v. Lord Llandaff, 1 Ball & B., 241.
(*i*) Hesse v. Briant, 6 De G. M. & G., 623.

a state of intoxication, and that even in the absence of any unfair advantage taken of his situation which would induce the court to rescind the contract.(*j*) But the mere fact that some glasses of liquor had been drunk before the signing of the contract will not avoid it, if there be nothing to show that the defendant acted without a full understanding of what he was doing.(*k*)[1] In one case Stuart, V. C., refused to allow a third party, who, having got a subsequent transfer of the property, was the substantial defendant, to avail himself of this defense.(*l*)[2]

§ **385**. One kind of that unfairness which stays the interference of the court arises where the enforcement of the contract would be injurious to third persons. Therefore where an estate was settled in strict settlement, giving to the settler a life estate and an ultimate remainder, and the tenant for life entered into a contract for the sale of the fee, the court refused to allow the purchaser to take the interest of the tenant for life with compensation, on the ground that a father and a stranger would be likely to use an estate without impeachment of waste in a different way, and that, therefore, the sale might prejudice the interests of the persons in remainder.(*m*)

§ **386**. Again, where bankers, after a customer had commenced liquidation proceedings, secretly took a guarantee

(*j*) Cooke v. Clayworth, 18 Ves., 12; Nagle v. Baylor, 3 Dr. & War., 60. In Butler v. Mulrihill, 1 Bli., 137, a contract obtained by fraud from an intoxicated party was set aside. The contract of a drunken man is not void, but voidable. Matthews v. Baxter, L. R. 8 Ex., 132.

(*k*) Lightfoot v. Heron, 3 Y. & C. Ex., 596.

(*l*) Shaw v. Mackray, 1 Sm. & G., 537.

(*m*) Thomas v. Dering, 1 Ke., 729.

[1] Pitt v. Smith, 3 Camp, 33; Fenton v. Holloway, 1 Stark., 126; Prentice v. Achorn, 2 Paige's Ch., 30; Duncan v. McCullough, 4 Serg. & Rawle, 484; Ford v Hitchcock, 8 Ohio, 214; Broadwater v. Darne, 10 Mo., 277; Harrison v. Lemon, 3 Black., 51; Hotchkiss v. Farston, 7 Yerg., 67; Callaway v. Weatherspoor, 5 Ired. Eq., 128; Donelson v Posey, 13 Ala., 752; Lavette v. Sage, 27 Conn., 577; see, however, Pittinger v. Pittinger, 2 Green Ch., 156.

[2] Courts of equity, on grounds of public policy, do not incline to lend their assistance to a person, who has obtained an agreement or deed from another, in a state of intoxication; and they are equally unwilling to assist the intoxicated party to get rid of his agreement, or deed, merely on the ground of his intoxication at the time. They will leave the parties to their ordinary remedies at law, unless there is some fraudulent contrivance or imposition practiced. Story's Eq. Jur., §§ 231, 232. Campbell v. Ketchum, 1 Bibb., 406. White v. Cox, 3 Hayw., 82; Wigglesworth v. Steers, 1 Hen. & Munf., 70; Taylor v. Patrick, 1 Bibb., 168. It has been supposed, however, that if a person make himself drunk, with the intention of avoiding a contract entered into by him while in that state, that he would not be permitted to carry this fraud into effect. Pars. Contr., vol. 1, p. 311. It seems that the same doctrine that applies to agreements is likewise applicable to wills. Swinburn (pt. 2, § 6) tells us that, in order to render a will void, the testator must be utterly deprived of reason and understanding; "otherwise, albeit, his understanding is obscured, and his memory troubled, yet may he make his testament, being in that case."

from his brother that the bank's loss should not exceed £2,000, and thereupon forebore to take proceedings against the customer or to prove against his estate, the court, on the ground that this arrangement tended to give the bankers an undue advantage over the other creditors, dismissed a bill filed by the bankers to enforce specific performance of the guarantee.(*n*)

§ **387**. If a voluntary settler enters into a contract to sell the estate and brings an action to carry the contract into execution, the court will not generally assist him thus to override the settlement and prejudice the interests of the persons claiming under it;(*o*) but it seems that if the purchaser is willing to complete on having a good title shown, and his only objection, the existence of the voluntary settlement, is one that he can remove by completing the purchase, the general rule will not apply.(*p*)

§ **388**. The court will not generally exercise its extraordinary power in compelling a specific performance, where to do so would necessitate a breach of trust, or of a prior contract with a third person,(*q*) or would compel a person to do what he is not lawfully competent to do—partly, as it seems, on the ground of the unfairness and illegal taint of such a contract in itself, and partly of the hardship to which it would expose the person forced to execute it. The plaintiff "must also," said Lord Redesdale, "show that, in seeking the performance, he does not call upon the other party to do an act which he is not lawfully competent to do; for, if he does, a consequence is produced that quite passes by the object of the court in exercising the jurisdiction, which is to do more complete justice."(*r*)

§ **389**. Therefore, where trustees enter into a binding contract for a sale under a power, but one so disadvantageous as to be a breach of trust, the court will not specifically perform the contract;(*s*) and so, again, where trustees for sale for the benefit of creditors made a sale by auction,

(*n*) McKewan v. Sanderson, L. R. 20 Eq., 65. Cf. De Cordova v. De Cordova, 4 App. C., 692.

(*o*) Johnson v. Legard, T. & R., 281; Smith v. Garland, 2 Mer., 123; Clarke v. Willott, L. R. 7 Ex., 313.

(*p*) Peter v. Nicolls, L. R. 11 Eq., 391. The difficulty of being quite sure that the settlement has not been made good by some *ex post facto* matter, will, it is conceived, usually deter purchasers from being willing to complete. See infra, § 871.

(*q*) Willmott v. Barber, 15 Ch. D., 96, 107. Cf. Mulholland v. Mayor of Belfast, 9 Ir. Ch. R., 204, 215.

(*r*) Harnett v. Yielding, 2 Sch. & Lef., 553. See Byrne v. Acton, 1 Bro. P. C., 186; Tolson v. Sheard, 5 Ch. D., 19; Oceanic Steam Navigation Co. v. Sutherbury, 16 id., 236; Mansfield v. Childerhouse, 4 id., 82.

(*s*) Mortlock v. Buller, 10 Ves., 292. Accordingly, Bridger v. Rice, 1 J. & W., 74; Wood v. Richardson, 4 Beav., 174; Maw v. Topham, 19 id., 576. See, also, Hill v. Buckley, 17 Ves., 394; Neale v. Mackenzie, 1 Ke., 474; Rede v. Oakes, 4 De G. J. & S., 505.

under circumstances of improvidence and likely to prejudice the owner of the estate, for the sake of immediately realizing money to pay his creditors, the court pursued the same course.(*t*) And where, on the sale of trust property, it was agreed that the purchaser should, out of the purchase-money, retain a private debt due to him from the trustee, a demurrer to a bill by the trustee was allowed.(*u*) Again, where trustees entered into a contract for a lease which was in excess of their power;(*v*) and, again, where they entered into a covenant for renewal which was *ultra vires*, the court on this ground, in both cases, refused specific performance.(*w*)

§ **390**. Where trustees for sale misrepresented the value of the property, when they had the means in their power of stating it correctly, and the conditions of sale stipulated for compensation on either side; one of the grounds on which the House of Lords reversed a decree for compensation was, that the court would not give effect to a condition which would injure the *cestuis que trust*, by reason of the neglect of the trustees in making the misdescription which was the ground for compensation.(*x*)

§ **391**. In another case, the court refused performance of a contract for the sale of leaseholds by one of two executors, on the ground that, under the circumstances of the case, it would be an injury to the *cestuis que trust*, and expose the executor to extraordinary risk from them, and that either of these grounds was sufficient to stay the interference of the court.(*y*)

§ **392**. But where trustees, who had without authority granted leases, put up the property for sale under conditions which expressly provided that no objection should be made in respect of such leases, and that the purchaser should take subject to such interests as the tenants might be entitled to thereunder, the court held the purchaser precluded from objecting on the ground of breach of trust.(*z*) It is con-

(*t*) Ord v. Noel, 5 Mad., 438.
(*u*) Thompson v. Blackstone, 6 Beav., 470.
(*v*) Harnett v. Yielding, 2 Sch. & Lef., 549. Accordingly Byrne v. Acton, 1 Bro. P. C., 186.
(*w*) Bellringer v. Blagrave, 1 De G. & S., 63.
(*x*) White v. Cudoon, 8 Cl. & Fin., 766; reversing S. C., *s. n.*, Cudden v. Cartwright, 4 Y. & C. Ex., 25. See infra, § 1261.
(*y*) Sneesby v. Thorn, 1 Jur. (N. S.), 536, before Lord Hatherley (then Wood, V. C.), affirmed, 7 De G. M. & G., 399. See, also, Magrane v. Archbold, 1 Dow, 107; Trappes v. Cobb, 16 W. R., 117; Naylor v. Goodall, 26 id., 162. But in Barrett v. Ring, 2 Sm. & Gif., 43, Stuart, V. C., compelled trustees of a Road to complete a contract for sale which had been made in forgetfulness of a statutory right of pre-emption, and might expose them to an action for damages.
(*z*) Micholls v. Corbett, 34 Beav., 376; 3 De G. J. & S., 18.

ceived, however, that trustees generally cannot by contract prevent the operation of the court's usual unwillingness to enforce any transaction resulting in injury to third persons.

§ **393**. Even where there is nothing amounting to a distinct breach of trust the court will be delicate of interfering against trustees; so that where, in a contract for sale by them, there is any want of a business-like character, the court will not, it seems, interfere, unless the price be shown to be equal, or more than equal, to the value of the property.(*a*)[1]

§ **394**. The doctrine does not apply only to persons standing in the position of formal trustees, but, it seems, to all cases of trust and confidence. So, that if a contract were the result of a gross breach of duty by an agent towards his principal, the court would not, it seems, enforce the consequences of that act.(*b*) And so, railway directors having duties towards the shareholders, the court will not enforce any contract amounting to a breach of duty to the prejudice of all or any of the shareholders at the instance of a plaintiff cognizant of the circumstances.(*c*)

§ **395**. The court has on this ground not only refused specific performance, but in a case where the purchaser must have known that assignees in bankruptcy were dealing without sufficient knowledge, and that the creditors who were to ratify it were equally ignorant, the court, on the ground of the breach of trust of the assignees (as well as other grounds), set aside the contract.(*d*)

§ **396**. In one case Lord Romilly, M. R., took into consideration the injury likely to arise to the public from the specific performance of a contract relating to the level of a railway, and on the ground of that injury refused to compel the company to lower the level of their line. But the case was reversed on appeal.(*e*)

(*a*) Goodwin v. Fielding, 4 De G. M. & G., 90.
(*b*) Mortlock v. Buller, 10 Ves., 292, 313.
(*c*) Shrewsbury and Birmingham Railway Co. v. London and North Western Railway Co., 4 De G. M. & G., 115; affirmed, and this principle approved, 6 H. L. C., 113.
(*d*) Turner v. Harvey, Jac., 169.
(*e*) Raphael v. Thames Valley Railway Co., L. R. 2 Eq., 37; 2 Ch., 147.

[1] But where a trustee sells property, having authority so to do, in order to invest the proceeds more advantageously, he must exercise his opinion fairly and honestly; and if it appears that he was swayed by private interests and selfish ends, and that the price was utterly disproportionate to the real value of the property, a court of equity will not sanction the act. Wormley v. Wormley, 8 Wheat., 421.

CHAPTER VI.

OF THE HARDSHIP OF THE CONTRACT.

§ **397**. It is a well-established doctrine that the court will not enforce the specific performance of a contract, the result of which would be to impose great hardship on either of the parties to it;(*a*)[1] and this although the party seeking specific performance may be free from the least impropriety of conduct.(*b*)[2]

§ **398**. The question of the hardship of a contract is generally to be judged of at the time at which it is entered into; if it be then fair and just and not productive of hardship, it will be immaterial that it may, by the force of subsequent circumstances or change of events, have become less beneficial to one party,(*c*) except where these subsequent events

(*a*) Per Lord Brougham in Gould v. Kemp, 2 My. & K., 308.
(*b*) Per Kindersley, V. C., in Falcke v. Gray, 4 Drew., 660.
(*c*) Lawder v. Blachford, Beat., 522; Webb v. Direct London and Portsmouth Railway Co., 9 Ha., 129 (S. C. on appeal, 1 D. M. & G., 521).

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[1] Hard and unconscionable bargains are not of such a nature that a court of equity can decree their performance. Kimberly v Jennings, 6 Sim., 340; Ohio v. Baum, 6 Ham., 383; Tobey v. County of Bristol, 3 Story, 800; Cannaday v. Shephard, 2 Jones' Eq. (N. C.), 224; Cathcart v. Robinson, 5 Pet., 263; Seymour v. Delancey, 3 Cow., 445. So, in Clarke v. Rochester, Lockport and Niagara Falls Railroad Co., 18 Barb. Sup. Ct. Rep., 350, the court would not adjudge a specific performance by a railroad company of the duty imposed upon them by the statute to construct farm crossings, but that the plaintiff should be left to his remedy for damages, in a case where the company had constructed an embankment upon land conveyed to them by the plaintiff, by which access to a portion of his land, which was of small value, was cut off, it appearing that the cost of such a crossing would be greatly disproportioned to the value of the land to be benefited by it. See, also, Barnett v. Spratt, 4 Ired Eq., 171.

[2] *Hardship of contract, when a defense?*] An action for specific performance will, in general, be dismissed, where the defendant is able to show that the granting of the plaintiff's prayer for relief would, under all the circumstances of the case, operate with unreasonable hardness upon him. Gould v. Kemp, My. & K., 308; Hylton v. Briscoe, 2 Ves. Sen., 304; Wood v. Griffith, 1 Swanst., 54; Kimberly v. Jennings, 6 Sim., 340; Talbot v. Ford, 13 id., 173; Seymour v. Delancy, 3 Cow., 485; Canaday v. Shepherd, 2 Jones' Eq., 224; Barrett v. Spratt, 4 Irdel. Eq., 171; Huntington v. Rogers, 9 Ohio St., 511; Reed v. Rudman, 5 Ind., 409; King v. Hamilton, 4 Peters, 311; Eastman v. Plumer, 46 N. H., 464; Chambers v. Livermore, 15 Mich., 381; Society, etc., v. Butler, 12 N. J. Eq., 498; Margraf v. Muir, 57 N. Y., 155; Tobey v. County of Bristol, 3 Storey, 800; Anderson v. Andrews, 28 Ala., 432; Thompson v. Tod, Pet., C. C., 380; Gould v. Womark, 2 Ala., 83; Ellis v. Burden, 1 Ala. Sel.

have been in some way due to the party who seeks the performance of the contract.[1] For whatever contingencies may attach to a contract, or be involved in the performance of either part, have been taken upon themselves by the parties to it. It has been determined that the reasonableness of a contract is to be judged of at the time it is entered into, and not by the light of subsequent events,(*d*) and we have already seen that the same principle applies in considering the fairness of a contract.(*e*)

§ **399**. On this ground it has been decided in several cases in Ireland, that where a lessee of renewable leaseholds covenants with his sub-lessee for renewal without fine on every renewal to himself, and subsequently a renewal is made to him, but on terms far less beneficial than had been the custom at the time he entered into the covenant, and on the expectation of the continuance of which he had so covenanted, he will nevertheless be obliged to renew to his sub-lessee, and that without any contribution towards the increased fine which he has paid.(*f*)[2] So where railway companies contract unconditionally for the purchase of land, and by their laches their powers expire before the comple-

(*d*) Jones v. Lees, 26 L. J. Ex., 9.
(*e*) See supra, § 370.
(*f*) Evans v. Walshe, 2 Sch. & Lef., 419; Revell v Hussey, 2 Ball. & B., 280; Lawder v. Blachford, Beat., 522.

Cas., 458; Lucas v. Burnett, 1 Greene (Iowa), 510; Griffith v. Frederick Co. Bank, 6 Gill. & John., 424; Waters v. Howard, 1 Md. Ch., 112; Smith v. Crandall, 20 Md., 482; Daniel v. Fraser, 40 Miss., 507; Rodman v. Zilley, 1 N. J. Eq., 320; Stoutenburgh v. Tompkins, 9 id., 332; McWharton v. McMahon, 1 Oaks (N. Y.), 400; Leigh v. Crump, 1 Ired. Eq., 299; Farr v. Gladdings, 1 Phila., 372; Hall v. Ross, 3 Hayw., 200; Rice v. Rawlings, Meigs, 496; Eastland v. Vanarsdale, 3 Bibb., 274; Wingate v. Fry, Wright, 105; McCarty v. Kyle, 4 Coldw. (Tenn.), 348; Smith v. Wood, 12 Wis., 382; Stone v. Pratt, 25 Ill., 25.

Executed contract.] Where an agreement has been executed by the parties, a court of equity will declare it void solely on the ground that it is unconscionable. This is true except in the case of an heir expectant. Davidson v. Little, 22 Pa. St., 245.

Payment in confederate money.] A party contracted to convey real estate, and received notes for the purchase money, payable in confederate money, which, before the maturity of the notes, became worthless. Held, that specific performance would not be decreed. Daughdrill v. Edwards, 59 Ala., 424.

[1] It is said by Mr. Justice Story (Eq. Jur., § 750) that a court of equity will not decree a specific performance of a contract, where a change of circumstances, or otherwise, would render the decree unconscientious. It does not appear, however, that the cases of the Bank of Alexandria v. Lynn, 1 Pet. R., 376; Catheart v. Robinson, 5 Pet., 264, and Harnett v. Yieldlng, 2 Sch. & Lefr., 554, quoted in support of that view of the case, at all impair the rule as laid down in the text. See the comments on Harnett v. Yielding, made in Dyas v. Cruise, 2 J. & L., 460; S. C., 8 Ired. Eq., 407.

[2] See, also, Thomas v. Burne, 1 Dr. & Wal., 657.

tion of the purchase, that circumstance furnishes them with no ground of defense.(*g*)

§ **400**. This is further well illustrated by the cases on awards; for where the contract contained in the submission is unfair, or conducing to hardship, the court will not interfere;(*h*) whereas hardship or unreasonableness in the award itself will not be a bar to the interference of the court: for the submission and not the award is the contract, and unreasonableness in the award is, therefore, a matter of subsequent, and arising from the decision of a judge whom the parties themselves have chosen, and the risks attending whose judgment they have taken on themselves.(*i*)[1]

§ **401**. It cannot, however, be denied that there are cases in which the court has refused its interference by reason of events subsequent to the contract. Thus, in The City of London v. Nash,(*j*) where a party had covenanted to re-build several houses, and, instead, had built but two new houses and only repaired the others, but, in so doing, had laid out at least £2,200, and put them in very good condition; Lord Hardwicke, holding that the covenant was one which, in its nature, the court could enforce, yet considered that specific performance would entail so great a loss and hardship on the defendant, and be so useless to the plaintiff, that the court would not enforce it, whether the defendant had mistaken the sense of the covenant to re-build, or perhaps had even knowingly evaded it. And so again, where a mortgagor had entered into a contract to grant a lease, expecting to obtain the mortgagee's consent, but failed in

(*g*) Hawkes v. Eastern Counties Railway Co., 1 De G. M. & G., 737, 755; S. C., 5 H. L. C., 331, 353. In Scottish North Eastern Railway Co. v. Stewart (3 Macq, 382, particularly 401), may be found expressions which appear to the contrary of the statement in the text. But the real point decided in the case was that, on the true construction of the contract, it was conditional on the making of the line.

(*h*) Nickels v. Hancock, 7 De G. M. & G. 300. See infra, § 1553 et. seq

(*i*) Wood v. Griffith, 1 Sw., 43; Weekes v. Gallard, 18 W. R., 331.

(*j*) 3 Atk., 512; S. C., 1 Ves. Sen., 12.

[1] An agreement to submit a question to arbitration depends on the honor and good faith of the parties. It is revocable, before the award is given; and it cannot be made irrevocable by any agreement of the parties. But though revocable both in equity and at law, before the award is duly made, yet if already made and published, it is too late for either party to revoke the submission without the consent of the other. And a declaration by one party that he will not be bound by the award is then of no avail. Courts of equity, it is said, upon these grounds, refuse to enforce agreements of this nature; though an award made under such an agreement will be carried into execution. Tobey v. County of Bristol, 3 Story, 800; Clement v. Hadlock, 13 N. H., 185.

this, and was in circumstances which rendered him practically unable to redeem, in a suit instituted by the intended lessee, the court refused specific performance, but granted the alternative prayer of the bill for recission.(*k*)

§ **402**. Notwithstanding these cases the general rule seems to be, that events subsequent to the contract, and not so involved in it as to render it unequal at the time it is entered into, cannot be brought forward to show the hardship of enforcing it. But where the subsequent events alleged for this purpose are acts of the plaintiff himself, or events in some sense within his power, the court may have regard to them in exercising its discretionary jurisdiction in specific performance. There are cases in which the court has considered that, by means of these events, such a change has taken place in the relative position of the plaintiff and defendant, as to render it inequitable specifically to enforce the contract against the latter.[1]

§ **403**. The leading case on this head is the Duke of Bedford v. The Trustees of the British Museum,(*l*) before Plumer, M. R., and Lord Eldon. Lord William Russell and Lady Rachel his wife, being in the occupation of Southampton House (afterwards called Bedford House) as their residence, in 1675 conveyed to Mr. Montagu adjoining land, for the purpose of his erecting on it a mansion, with suitable appendages of gardens and offices; and Mr. Montagu entered into covenants with Lady Rachel Russell not to use the land in a particular manner, with a view to the more ample enjoyment of the adjoining lands. Lady Rachel Russell, or those claiming under her, subsequently covered these lands, or a considerable part of them, with houses, and Southampton House was pulled down to make way for streets and buildings. On a motion by the Duke of

(*k*) Costigan v. Hastler, 2 Sch. & Lef., 160. (*l*) 2 My. & K., 552.

[1] There is no difference between a contract unreasonable when made, and one which becomes so afterward, if the applicant be in fault. Garnett v. Macon, 6 Call, 308; S. C., 2 Brock., 185. Thus, a very great change in the value of property is a serious objection to a decree for specific performance, where the vendor is in fault, as it may affect the arrangements of the vendee for a compliance with the contract. Garnett v. Macon, 6 Call, 308. Again, in Forde v. Herron, 4 Munf., 316, it is said that a sale ought not to be set aside upon the grounds of smallness of price, where the complainant was himself in fault. And Clay v. Turner, 3 Bibb., 52, is a case to the effect that equity will rescind a contract, although the parties cannot be reinstated, if the act of the party plaintiff shall have prevented it.

Bedford, who claimed under Lady Rachel Russell, for an injunction to restrain the defendants, who claimed under Mr. Montagu, from using the land in a way at variance with the covenants of the deed of 1675, Plumer, M. R., and Lord Eldon held that the duke or his predecessors having altered the state of the property in the way mentioned, it would be inequitable, unreasonable and unjust, thus to enforce the covenants specifically, and the plaintiff was left to his remedy at law.(*m*)[1] And so, long acquiescence in a variation from the mode of renewal, pointed out by a covenant for that purpose, has been held a reason for not specifically enforcing the covenant in its original terms.(*n*)

§ **404**. Where the conduct of the plaintiff subsequent to the contract has led the defendant into a trap, though the plaintiff's conduct may have been unintentionally injurious, the court will refuse specific performance. Thus, in one case, the contract for sale of leaseholds liable to a covenant to insure stipulated that the contract should be completed on the 20th July; the insurance expired on the 24th June; one of the vendors renewed for a month only, to the 24th July; the contract in fact was not completed before the 26th August, when the parties met for that purpose, and it was discovered that the insurance had expired and the leaseholds had become liable to forfeiture; and the purchaser refused to complete. Kindersley, V. C., held that the property was at the risk of the purchaser; but as the vendors' conduct had operated as a trap to the purchaser, he refused specific performance.(*o*)

§ **405**. It would seem that, in considering the hardship which may flow from the execution of a contract, the court will consider whether it is a result obviously flowing from the terms of the contract, so that it must have been present at the time of the contract to the minds of the contracting parties, or whether it arises from something collateral, and so far concealed and latent, as that it might not have been

(*m*) See per Knight Bruce, L. J., in Shrewsbury and Birmingham Railway Co. v. Stour Valley Railway Co., 2 De G. M. & G., 882.

(*n*) Davis v. Hone, 2 Sch. & Lef., 341.

(*o*) Dowson v. Solomon, 1 Dr. & Sm., 1.

[1] Low v. Treadwell, 12 Me., 441; Brashier v. Gratz, 6 Wheat., 528; Mechanics' Bank v. Lynn, 1 Pet., 383; Taylor v. Longworth, 14 id., 173; Willard v. Taylor, 8 Wall., 537; Marble Co. v. Ripley, 10 id., 330. Where the subsequent changed circumstances were caused by the plaintiff's wrongful acts, this will be a ground for refusing specific performance. Stone v. Pratt, 25 Ill., 25.

thus present to their minds.(*p*) It is obvious that a far higher degree of hardship must be present in the former, than in the latter class of cases, for it to operate on the discretion of the court.[1]

§ **106**. The cases which have been already quoted as showing that the hardship must be judged of at the time of the contract also illustrate another obvious principle, namely, that where the hardship has been brought upon the defendant by himself, it shall not be allowed to furnish any defense against the specific performance of the contract.(*q*) at least whenever the thing he has contracted to do is "reasonably possible."(*r*)

§ **107**. It will not constitute a case of hardship that the ultimate object which a party had in view in entering into a contract may have become impossible; the mere failure of the purchaser's speculation will not discharge him from his obligations to the vendor. Thus, where one person contracted with another for the purchase of a piece of land on which he intended to erect a mill, for which the consent of a corporation was requisite, the refusal to give this consent furnished no defense to the purchaser, although he had, in consequence of the object he had in view, given a very high price for the ground.(*s*) And so also the fact that a mine which the defendant had contracted to take for £1,400 turned out literally worth nothing was held to be no defense to a suit for specific performance of the contract.(*t*)

§ **108**. In cases against companies, the court will not consider the hardship which may result to the individual members from enforcing a contract made by the whole body: for "the court cannot recognize any party interested in the corporation, but must look to the rights and liabili-

(*p*) See e. g cases stated, § 409.

(*q*) See per Lord Hardwicke in Pembroke v. Thorpe, 3 Sw., 443 n

(*r*) Per Knight Bruce, V. C., in Storer v. Great Western Railway Co., 2 Y. & C. C. C., 52.

(*s*) Adams v. Weare, 1 Bro. C. C., 567; Morley v. Clavering, 29 Beav., 84; per Turner, V. C., in Webb v. Direct London and Portsmouth Railway Co., 9 Ha., 140; per Lord Romilly, M. R., in Lord James Stuart v. London and North-Western Railway Co., 15 Beav., 523 (as to these last two cases see infra, § 965). Distinguish Bray v. Briggs, 20 W. R., 962.

(*t*) Haywood v. Cope, 25 Beav., 140.

[1] *The mere naked hardship* of a contract is not in itself a valid objection to its enforcement in equity, in a case where the contract is otherwise equitably entitled to be specifically enforced. Morrison v. Pray, 21 Ark., 110; Coke v. Bishop, 3 Swanst., 401; Chubb v. Peckham, 13 N. J. Eq., 207; Corson v. Mulvany, 49 Pa. St., 88; Low v. Treadwell, 12 Me., 441; Eames v. Eames, 16 Mich., 348; Lee v. Kirby, 104 Mass., 420; Addington v. McDonald, 63 N. C., 389; Morgan v. Scott, 26 Pa. St., 51; Nims v. Vaughn, 40 Mich., 356.

ties of the corporation itself;"(*u*) and though, as we have seen,(*v*) the decision of the case in which this language was used by Lord Cottenham has been disapproved of in the House of Lords, this principle seems to be untouched, and to rest on solid reasoning.

§ **409**. If the execution of the contract would render the defendant liable to a forfeiture, the court will regard this as a circumstance of hardship; so where a man was entitled to a small estate under his father's will, on condition that, if he sold it within twenty-five years, half the purchase money should go to a brother; the owner agreed to sell it, but Lord Hardwicke held that the hardship was sufficient to determine the court not to interfere.(*w*) So where a lessee sold certain lots of building ground, and agreed to make a road, which it was found he could not do without incurring the risk of forfeiting a piece of leasehold land through which it was to pass, or of being sued by the lessor, the court, granting the purchaser specific performance of the contract for sale, refused to enforce this stipulation, but gave him compensation for the non-performance of it.(*x*)[1]

§ **410**. But the court will give no effect to this defense unless it clearly appear that the forfeiture will follow on the judgment for specific performance. The mere apprehension of such a result is not enough. Nor will the court give much, if any, consideration to this defense where the forfeiture is the result of other acts of the defendant himself. So where a lessee of a theatre, having, by his lease, power to lease forty-one boxes, agreed to let a box to the plaintiff, and in defense alleged that he had already let forty-one boxes, so that to perform his contract with the plaintiff would work a forfeiture, his defense failed.(*y*)

(*u*) Per Lord Cottenham in Edwards v. Grand Junction Railway Co., 1 My. & Cr., 674; Hawkes v. Eastern Counties Railway Co., 1 De G. M. & G., 737, 754; cf. supra, § 394.

(*v*) See supra, § 234.
(*w*) Paine v. Brown, cited 2 Ves. Sen., 307.
(*x*) Peacock v. Penson, 11 Beav., 355.
(*y*) Hetling v. Lumley, 3 De G. & J., 493.

[1] *Forfeiture.*] A contract of sale provided that if the vendee failed to make his payments at the time agreed upon, "strictly and literally, without any default, the contract shall become void, and the rights and interests thereby created cease and determine, and the property revert to, and revest in, the vendor, without any declaration of forfeiture or act of re-entry, or without any right on the part of the vendee of reclamation or compensation. Held, that where the notes given for the purchase money were not paid, it was competent for the vendor to declare a forfeiture without offering to return the notes. Phelps v. Illinois Cent. R. R. Co., 63 Ill., 468.

§ **111**. To this head of hardship we may, perhaps, best refer the cases which establish that, where the vendor is liable to certain covenants, and has not expressly stipulated that the purchaser shall indemnify him against them, yet the purchaser, so soon as he has notice of them, whether by the particulars of sale (*z*) or subsequently to the contract, (*a*) is bound to elect either to rescind the contract or to execute an indemnity to the vendor; for otherwise the vendor would lose his land but retain his liability in respect of it. In the earlier of the cases cited, it was only decided that the purchaser as plaintiff could not enforce specific performance without entering into such indemnity; but, in the latter, that the vendor as plaintiff might put the purchaser to his election.

§ **112**. In one case where trustees had joined their *cestuis que trust* in a contract for sale, and had personally agreed to exonerate the estate from the incumbrances, and it did not appear whether the purchase-money would be sufficient to discharge them, or what would be the extent of the deficiency, the court refused specific performance on the ground of hardship, although the plaintiff had had possession of the estate, and could not be deprived of the benefit of his contract without great inconvenience. (*b*) In another case a mortgagee with power of sale had obtained a foreclosure decree, and, intending to sell as absolute owner, entered into a contract for sale to the plaintiff. In the contract there was copied, by inadvertence, from conditions of sale of other parts of the estate drawn up some time before, a clause stating the vendor to be a mortgagee with power of sale; the vendor offered to convey as owner under the foreclosure decree; the purchaser insisted on a title under the power of sale; but the court held that, to impose on the vendor the risk of opening the foreclosure decree by such a sale, was a hardship which it would not put on him, and accordingly dismissed the bill unless the plaintiff would accept the conveyance which the defendant was ready to execute. (*c*)

§ **113**. But where a tenant for life had agreed to grant a

(*z*) Moxhay v. Inderwick, 1 De G. & Sm., 708

(*a*) Inkey v. Higgs, 24 L. J. Ch., 495 (Kindersley, V. C.).

(*b*) Wedgwood v. Adams, 6 Beav., 600.

(*c*) Watson v. Marston, 4 De G. M. & G., 230.

mining lease, and to a bill by the intended lessee he objected that he was only tenant for life, and that he could not grant the lease in question under his power, and that he should be accountable for waste, Lord Nottingham appears to have considered this to be no defense, and he decreed the defendant to execute the contract so far as he was capable of doing.(*d*)

§ **414**. In one case Lord Hardwicke, on the ground of hardship, refused specific performance of a covenant to leave buildings in repair contained in an ecclesiastical lease, the fact of the description of the buildings being continued from lease to lease without variation showing that the buildings in question might not have been in being at the time of the making of the lease.(*e*) And where a lessee of mines covenanted that if *at any time* before the expiration of the lease, the lessor should give notice of his desire to take the machinery and stock about the mines, the lessee would at the expiration of the lease deliver the articles specified in the notice to the lessor, on his paying the value, to be ascertained by valuation, the court held the covenant thus framed to be so injurious and oppressive to the lessee that it refused specific performance, and would not interfere to prevent a breach by injunction.(*f*) Again, where A., in consideration of B.'s not joining in barring an entail, agreed to convey to him, his heirs or assigns, the fee of such parts of the estates, which were situate in three counties, as he or they should choose, to the yearly value of £200; the inconvenience and hardship to which such an option might expose the party who had granted it was one ground on which specific performance was refused by the House of Lords.(*g*) In another case the court refused to enforce a contract for service by which a young man placed himself almost entirely in the power of certain great traders, by whom he was employed as traveler and clerk.(*h*)

§ **415**. Where a contract, if enforced, would make a man buy what he could not enjoy, the court will, on the ground of hardship, refuse to interfere, as in the case of a contract

(*d*) Cleaton v. Gower, Finch, 164; but see the cases stated supra, § 385 et seq.
(*e*) Dean of Ely v. Stewart, 2 Atk., 44.
(*f*) Talbot v. Ford, 13 Sim., 173.
(*g*) Hamilton v. Grant, 3 Dow, 33, 47.
(*h*) Kimberley v. Jennings, 6 Sim., 340; this case has been overruled, but on another point, by Lumley v. Wagner, 1 De G. M. & G., 604.

to sell a piece of land to which no way could be shown, the contract itself being silent as to any right of way.(*i*)

§ **116**. The principle applies equally to contracts between companies as to those between private individuals; and, therefore, where the result of such a contract was to divert from its legitimate channel a considerable portion of the profits of one part of the line of one company for the benefit of the other, without securing any corresponding portion of profits of the other line, the court refused to interfere by way of specific performance, irrespective of the consideration whether such contracts were legally binding or not.(*j*)

§ **117**. The inadequacy of the consideration on the one side or the other is a form of hardship frequently alleged. This will be considered separately in the next chapter.[1]

(*i*) Denne v. Light, 26 L. J. Ch., 459; 8 De G. M & G., 774 Consider Tomlinson v. Manchester and Birmingham Railway Co., 2 Rail. C., 164, 123.

(*j*) Shrewsbury and Birmingham Railway Co. v. London and North-Western Railway Co., 4 De G. M. & G., 115; S C., 6 H. L. C., 113.

[1] *Where the plaintiff occasions the hardship of the contract*, it will not be enforced Garnett v. Macon, 6 Call., 308; Ford v. Heuson, 4 Munf., 316; Turner v. Clay, 3 Bibb., 52; Patterson v. Marty, 8 Watts, 374; Potts v. Dougherty, 25 Pa. St., 405; Whittaker v. Bond, 63 N. C., 290.

CHAPTER VII.

OF INADEQUACY OF THE CONSIDERATION.

§ **418**. We now proceed to inquire how far the inadequacy of the consideration for a contract may furnish a defense against its specific performance. The inadequacy may, it is evident, in contracts for sale be either on the side of the vendor or of the purchaser; either in the purchase money or in the thing sold; or again, in other cases, it may consist in the inequality of the contingencies to which the contract has reference.(*a*)[1]

§ **419**. It has been justly remarked that there is a great difference between the defense grounded on the inadequacy of purchase money set up by the vendor, and on the excess of it set up by the purchaser; for whilst the court can ascertain the former by a reference to the general market value of such property, it has no satisfactory means of determining what represents the money value to a particular individual of a particular estate.(*b*)

§ **420**. There is no doubt that inadequacy of consideration, when combined with any case of fraud, misrepresentation, studied suppression of the true value of the property,(*c*) or with any circumstances of oppression, or even of

(*a*) Hamilton v. Grant, 3 Dow., 33
(*b*) Dart, Vend., 1083.
(*c*) Deane v. Rastron, 1 Ans., 64

[1] *Examples of sufficient consideration.*] In Curlin v. Hendricks, 25 Tex., 225, it was held that it was sufficient, if some profit is to enure to the promissor, or some detriment to the promisee. Where a person is prevented from performing an intended act (as making gifts, or arrangements by will, or otherwise) by the promise of another, a court of equity will decree specific performance of such promise. Mead v. Randolph, 8 Tex., 191; Coles v. Pilkington, L. R., 19 Eq., 174. A written contract was made before, and in consideration of marriage. Held, that the court would aid in enforcing it. Geners v. Wright, 18 N. J. Eq., 330. In a controversy concerning a will, there was an agreement to compromise. Held, that specific performance would be decreed, without inquiry into the sufficiency of the consideration. Leach v. Forbes, 11 Gray, 506. Land was dedicated to a county on consideration that a certain town should be made the county seat. Held, that such contract should be specifically enforced if the town was so made. Reese v. Lee Co., 49 Miss., 639; see, also, Twiss v. George, 33 Mich., 233; Watson v. Mohan, 20 Ind., 223; Thomas v. Kyles, 1 Jones' Eq., 302.

ignorance,(*d*) is a most material ingredient in the case, as affecting the discretion of the court in granting specific performance; and, further, it may materially concur in constituting a case for setting aside a transaction. Thus, in Cockell v. Taylor,(*e*) Lord Romilly, M. R., set aside an alleged sale of land to the plaintiff, where the consideration was about ten times the value of the land—the purchase having been made the condition of a loan which the plaintiff was very anxious to negotiate in order to prosecute his claim in chancery to some valuable property, and he being in humble circumstances and illiterate. "Coupled with such circumstances," said his lordship, "the evidence of over-price is of great weight, and if the case had stood here I should have been of opinion that this transaction was one which could not stand."(*f*) Inadequacy of consideration may also concur with other circumstances to show that the transaction was in the nature not of a contract for sale but of a gift, in respect of which, therefore, the court would not interfere, as it does not decree the specific performance of incomplete gifts.[1](*g*)[2]

§ **421**. The question, however, which has been principally discussed, is the effect on contracts of the inadequacy of consideration taken by itself and abstracted from all other circumstances.

§ **422**. With regard to it as a ground for the setting aside

(*d*) Young v. Clarke, Prec. Ch., 538; see, also, per Kindersley, V. C., in Falcke v. Gray, 4 Drew., 660; Lewis v. Lord Lechmere, 10 Mod., 503.

(*e*) 15 Beav., 103

(*f*) 15 Beav., 115.

(*g*) Callaghan v. Callaghan, 8 Cl. & Fin., 374.

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[1] *(Gifts of real estate.)* Such gifts will be enforced with great caution, and not usually unless improvements have been made, and the donee has taken possession by reason of such gift. Guynon v. McCauley, 32 Ark., 97; Ballard v. Ward, 89 Pa. St., 358; Evans v. Battle, 19 Ala., 398; Cox. v. Cox, 59 id., 591; Jones v. Taylor, 6 Mich., 364. Ferry v. Stevens, 66 N. Y. (Ct. of App.), 321, is an instructive case on this point.

[2] Inadequacy of consideration when combined with unfairness of any kind, as oppression, imbecility of mind, surprise, or undue advantage taken, will warrant the consideration of a court of equity. Gasque v. Small, 2 Strobh's Eq., 72; Modisett v. Johnson, 2 Black., 431; Cathcart v. Robinson, 5 Pet., 263; Cabeen v. Gordon, 1 Hill. Ch., 51; Bunch v. Hurst, 3 Dessau., 273; McCormick v. Malin, 5 Blackf., 509; Brooke v. Berry, 2 Gill & J., 83; Howard v. Edgell, 17 Verm., 9; Harrison v. Town, 17 Miss. (2 Bennett), 237; Powers v. Hale, 5 Foster (N. H.), 145. But it has been justly said that, in all these cases, it is the fraud, rather than the inadequacy of price, which affords the ground for relief. They are considered as cases of constructive fraud, in which the inadequacy of the consideration is received as evidence. See Osgood v. Franklin, 2 John. Ch., 24, and Willard's Eq. Jur., § 1, ch. 4, p. 263.

of transactions, the doctrine of the court is, that inadequacy of consideration, if only amounting to hardship, or even great hardships, is no ground for relieving a man "from a contract which he has wittingly and willingly entered into;"(*h*) but that it may be so enormously great as to be a conclusive evidence of fraud, and that it is then a ground for setting aside the transaction affected by it.(*i*)[1]

§ **123.** Regarded as a ground of defense to a specific performance, the doctrine of the older cases was, that inadequacy of consideration was a sufficient ground, it being regarded—even where not amounting to evidence of fraud—as a circumstance of hardship which would stay the interposition of the court. Thus, in a case before Eyre, C. B., that judge said that, independently of all consideration of fraud, "the court upon the mere consideration of its being so hard a bargain will not enforce it."(*j*) So, in a case where there was a contract between two men each *sui juris* for the sale of an estate worth £10,000 for £6,000 down and £14,000 more, payable at the death of a man aged sixty-four or sixty-five, and there were no circumstances of pressure or circumvention, Lord Alvanley, M. R., refused, on a cross-bill, to set aside the contract, but he also refused specific performance of it on the ground of its being a hard bargain.(*k*) And in an earlier case, where a purchaser had, during the South Sea mania, purchased a house under the court for £10,500, and paid a deposit of £1,000, the pur-

(*h*) Griffith v. Spratley, 1 Cox, 383, 388-9; 2 Bro. C. C., 179; Fox v. Mackreth, 2 Dick., 683. See, too, Harrison v. Guest, 6 De G. M. & G., 424, affirmed in D. P., 8 H. L. C., 481.

(*i*) Stilwell v. Wilkins, Jac., 280.

(*j*) Tilly v. Peers, cited by Sir S. Romilly, *arg.*, 10 Ves., 301.

(*k*) Day v. Newman, 2 Cox, 77; S. C., cited by Sir S. Romilly, *arg.*, 10 Ves., 300.

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[1] It would seem to be equally the settled rule of this country, that inadequacy of price is to be looked upon merely as evidence of fraud; that, of itself, it affords no ground for the interference of courts of chancery, which have never yet, in England or America, attempted to fix the prices at which owners may dispose of their property. But the consideration of a contract may be so grossly disproportionate as to amount to conclusive evidence of fraud; and in these cases only will the agreement be set aside. Wright v. Wilson, 2 Yerg., 294; Green v. Thompson, 2 Ired. Ch., 365; Butler v. Haskell, 4 Dessau., 651; Newman v. Meek, 1 Freem. Ch., 441; White v. Flora, 2 Overton, 426; Hardman v. Burge, 10 Yerg., 202; Knobb v. Lindsay, 5 Ham., 468. Osgood v. Franklin, 2 John. Ch., 1; Wintermute v. Snyder, 2 Green's Ch., 489; Stubblefield v. Paterson, 3 Hey., 128; McCormick v. Malin, 5 Blackf., 509; Juzan v. Toulmin, 9 Ala., 662; Delafield v. Anderson, 7 S. & M., 630; Holmes v. Fresh, 9 Miss., 201. There is a class of cases, however, where the defendant is an heir or expectant, in which inadequacy of price is alone sufficient to obtain relief in equity. Story's Eq. Jur., § 336, and notes 1, 2, 3, 4

chaser, submitting to forfeit his deposit, was discharged by Lord Macclesfield on the ground of the general delusion which the nation was under at the time of the contract, and the imaginary values then put by people on estates, and this in spite of a most able argument by Lord Nottingham, who argued on behalf of his granddaughters the plaintiffs.(*l*)

§ **121**. But it seems now to be established by the decisions of Lord Eldon and Grant, M. R., that mere inadequacy of consideration is no defense to specific performance,[1]

(*l*) Savile v. Savile, 1 P. Wms., 745; S. C., 5 Vin. Abr., 516, pl. 25. See, also, Vaughan v. Thomas, 1 Bro. C. C., 556.

[1] *Inadequate consideration.*] Mere inadequacy of consideration is not, in itself, a sufficient reason for refusing specific performance of a contract, and furnishes no sufficient cause for setting it aside. Heywood v. Cope, 25 Beav., 140; White v. Flora, 2 Overton (Tenn.), 426; Newman v. Meek, 1 Freem. Ch. (Miss.), 141; Wintermute v. Snyder, 2 Green's Ch., 489; Eyre v. Potter, 15 How., 42; Ayres v. Baumgarten, 15 Ill., 444; Harris v. Tyson, 24 Pa. St., 347; Kidder v. Chamberlain, 41 Vt., 62; Judge v. Wilkins, 19 Ala., 795; Charles v. Brady, 10 Fla., 133; Maddox v. Simmons, 31 Ga., 512; Holmes v. Fresh, 9 Mo., 201; Harrison v. Town, 17 id., 237; Shepherd v. Bevin, 9 Gill, 32; Potter v. Everett, 7 Ired. Eq., 152; Mann v. Betterly, 21 Vt., 326; Stearnes v Beckham, 31 Gratt., 379; Lee v. Kirby, 104 Mass., 420; Booten v Sheffer, 21 Gratt., 474; Sarter v. Gordon, 2 Hill. Ch. (S. C.), 121; Stanton v. Miller, 14 Hun, 383; S. C. aff'd, 58 N. Y., 192.

When inadequacy of consideration a defense.] In a case where the inadequacy of the consideration is such as to shock the moral sense of mankind, it will constitute a defense in an action for the specific performance of a contract. Fraudulent contract should be pleaded. Osgood v. Franklin, 2 John. Ch., 1; Garnett v. Macon, 2 Brock., 185; Fripp v. Fripp, Rice's Ch. 84; Hardiman v. Burge, 10 Yerg., 202; Juzan v. Toulmin, 9 Ala., 662; Davidson v. Little, 22 Pa. St., 245; White v. Thompson, 1 Dev. & Bat. Eq., 493; Burtch v. Hoagg, Han. (Mich.), 31; Rodman v. Zilley, 1 N. J., Eq., 320; Viele v. Troy R. R. Co., 2 Barb., 581; Western R. R. Co. v. Babcock, 6 Metc., 346; Hayes v. Hollis, 8 Gill, 357; Hale v. Wilkinson, 21 Gratt., 75; Clement v. Reid, 9 Sm. & Marsh, 535; Modiset v. Johnson, 2 Blackf., 431; Graham v. Pancost, 30 Pa. St., 89; Clitheral v. Ogilvie, 1 Dessau 's Eq., 250; Bunch v. Hurst, 3 id., 273; Butler v. Haskell, 4 id., 651.

Rule as to inadequacy of consideration.] Where this is relied upon as a defense in an action for the specific performance of a contract brought against the vendor, it must be shown that it resulted from the fraud, surprise, misrepresentation or concealment on the part of the purchaser, or that the purchaser took unconscionable advantage of the vendor's weakness or ignorance. This is the only safe rule. Lowther v. Lowther, 13 Ves , 113; Wall v. Stubbs, 1 Mad., 81; Cadman v. Harner, 18 Ves., 10; Western v. Russell, 3 V. & B , 187; Lukey v. O'Donnel, 2 Sch. & Lef., 471; Robinson v. Robinson, 4 Md. Ch., 182; Powers v. Hale, 25 N. H., 145; Eastman v. Plummer, id., 478; Lee v. Kirby, 104 Mass., 420; Davis v. Parker, 14 Allen, 94; Todd v. Grove, 33 Md., 188.

Examples where the consideration was held to be sufficient.] A party agreed to pay twice the value of real property, but the transaction was free from fraud, and he examined the property himself, although most of the land was covered with snow. Held, that specific performance would be decreed White v. McGannon, 29 Gratt., 511. Where the vender sold as trustee—held, that the inadequacy as to price might be set up as a defense; but not where the same was fair, although afterwards there was an opportunity to sell at a much greater sum. Goodwin v. Fielding, 4 De G. M. & G., 90. A parent made a contract with his son, to give him all his property, in consideration that the son should

unless it amount to an evidence of fraud, and so would furnish a ground even for cancelling the contract.(*m*) "Unless the inadequacy of price," said Lord Eldon in one case, "is such as shocks the conscience and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing a specific performance."(*n*) And in an earlier case, where, a sale by auction having taken place for about half the value of the estate, Lord Rosslyn had refused specific performance, Lord Eldon, on a rehearing, although he ultimately decided the case on a question of evidence, doubted the principle of the decree, and expressed an opinion that a sale by auction could not be set aside for mere inadequacy of price.(*o*) His lordship also applied the same principle in the instance of an annuity transaction.(*p*) The doctrine was adopted by Grant, M. R., and Lord Erskine, and is now, it is conceived, the well-established rule of the court.(*q*) An illustration of it may be found in the case of Abbott v. Sworder,(*r*) where an estate was bought for £5,000, the value of which was considered by Knight Bruce, V. C., to be £3,500; but this

(*m*) Per Lord Eldon in Stilwell v. Wilkins, Jac., 282; cf Harrison v. Guest, 6 De G. M. & G., 424, affirmed in D P, 8 H. L. C., 481.
(*n*) In Coles v. Trecothick, 9 Ves., 246.
(*o*) White v. Damon, 7 Ves., 30
(*p*) Underhill v. Horwood, 10 Ves., 209.
(*q*) Burrowes v. Lock, 10 Ves., 470; per Lord Erskine in Lowther v. Lowther, 13 id., 103; Collier v. Brown, 1 Cox, 428; Bower v. Cooper, 2 Ha., 408; Borell v. Dann, 2 id., 450. See, also, Griffith v. Spratley, 2 Bro. C. C., 179; 1 Cox, 383; Stephens v. Hotham, 1 K. & J., 571; Holmes v. Howes, 20 W. R., 310.
(*r*) 4 De G. & Sm., 448.

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support his parents during their lives. Held, sufficient. Lester v. Lester, 28 Gratt., 737; Lorentz v. Lorentz, 14 W. Va., 761.

Public sale; bid much under value.] Where a sale at public auction has been apparently fairly conducted, specific performance will be decreed, unless there is strong proof of fraud or imposition. Burrows v. Lock, 10 Ves., 470; Lowther v. Lowther, 13 id., 103; Collier v. Brown, 1 Cox, 426; Bower v. Cooper, 2 Hare, 408; Borel v. Dann, 2 id., 459; Griffith v. Sprightly, 2 Bro. C. C., 179; S. C., 1 Cox, 383; Stephens v. Hotham, 1 K. & J., 571; Russell v. Stimsen, 3 Hayw. (Tenn.), 1; Newman v. Meek, 1 Freem. Ch (Miss.), 141; Delafield v. Anderson, 7 Smed. & M., 630; Ready v. Noakes, 29 N. J. Eq., 497; Erwin v. Parham, 12 How., 197; Byers v. Surget, 19 How., 309. Inadequacy of price, coupled with other circumstances, may be a controling element in determining whether a public sale was fair or not. Benton v. Shreeve, 4 Ind., 66.

Time of the inadequacy of the consideration.] The inadequacy of consideration of a contract sought to be specifically enforced, must be determined with reference to the time the agreement was made. The date of the contract should be looked to, and if, at that time, the consideration was adequate, it is enough. Hale v. Wilkinson, 21 Gratt., 75; Mortimer v. Capper, 1 Bro. C. C., 156; Woodcock v. Bennett, 1 Cow., 711. See, however, where payment was to be made in confederate money. Love v. Cobb, 63 N. C., 324; Hudson v. King, 2 Heisk, 561; McCarty v. Kyle, 4 Cold, 349. See as to price rendered inadequate by *laches*. Whittaker v. Bond, 56 N. C., 290. Where the vendor declared himself satisfied, after entering into the contract, the court decreed specific performance. Woodruff v. Hargrave, Wright, 555.

inadequacy of consideration was held both by him and by Lord St. Leonards to be no bar to specific performance, which was accordingly decreed at the suit of the vendor.[1]

§ **425**. One case before Kindersley, V. C., must be referred to, as it appears to break the recent current of authorities. His honor there considered the older cases on the subject, and came to the conclusion that mere inadequacy of price, without the least impropriety of conduct on the part of the plaintiff, was a sufficient defense; and his honor did not advert to the proposition that such inadequacy must amount to evidence of fraud, but treated it as one form of hardship which prevented the action of the court.(*s*)

§ **426**. The general rule that the hardship of a contract

(*s*) Falcke v. Gray, 4 Drew., 651.

[1] In Westervelt v. Matheson, 1 Hoff. Ch., 37, the court refused to set aside a purchase of land made for $2,900, its highest value being estimated at $3,500, upon the ground that the inadequacy was not so gross as to indicate a fraud. Seymour v. Delancey, 3 Cow., 445, was a case on appeal from the decision of Chancellor Kent. The learned senator who delivered the prevailing opinion admitted that, when the inadequacy of price was strong evidence of fraud, the contract would not be carried into execution. "It is not to be denied," he observed, "that it is the settled doctrine of the court of chancery, that it will not carry into effect, specifically, a contract, when the inadequacy of the price amounts to conclusive evidence of fraud." But he could not admit that inadequacy of price, not amounting to fraud, was sufficient to stay the application of a court of equity to enforce the specific performance of a private contract to sell. It should be remarked that, although the decision was reversed, it was upon a different point, a question of fact; and that the views of Chancellor Kent were concurrent with the opinion of the court of errors. "Excess of price over value, though considerable," it is said in Cathcart v. Robinson, 5 Pet., 263, "if the contract be free from imposition, is not in itself sufficient to prevent a decree for specific performance." And no doctrine of equity is better settled than this, whether in regard to vendor or vendee. Garnett v. Macon, 2 Brock., 185; Rodman v. Zilly, Saxton, 320; White v Thompson, 1 Dev. & Bat. Ch., 493; Tripp v. Tripp, Rice's Ch., 84; Bean v. Valde, 2 Miss., 126. In the recent case of Viele v. Troy and Boston R R. Co., 21 Barb. Sup. Ct. Rep., 581, it was decided that, where a bill for the specific performance of a contract was brought before a court of equity, the court would make no inquiry into the adequacy of the consideration, unless the inadequacy be so great as to raise a conclusive presumption of fraud. This is undoubtedly the law of the State of New York at the present time. There is, perhaps, a distinction to be taken between cases of private sales and sales at auction. In reference to the last, it has been several times decided that inadequacy of price did not, in any case, amount to conclusive evidence of fraud. White v. Damon, 7 Ves., 30. In the case of Borell v Dann, the vice-chancellor said: Fraud, in the purchase, is of the essence of the objection to the contract, on the ground of inadequacy. The only exception to the rule for decreeing the specific performance of an unexecuted contract, on the ground of inadequacy of consideration, is that it is so gross that, of itself, it proves fraud or imposition on the part of the purchaser. The case, however, must be strong, indeed, in which a court of justice shall say that a purchaser, at a public auction, between whom and the vendors there has been no previous communication affecting the fairness of the sale, is chargeable with fraud or imposition, only because his bidding did not greatly exceed the amount of the vendors' bidding. See Willard's Eq. Jur., § 1, ch. 4, 425.

is, independently of fraud, a ground for refusing its specific performance, would seem to carry with it the particular rule that inadequacy of consideration, when amounting to hardship, but not to fraud, should yet be a defense. But there appears (notwithstanding an expression of opinion from the bench to the contrary[*t*]) great good sense in refusing to adopt such a rule. To make a contract for an insufficient consideration incapable of enforcement by the purchaser, would be practically to prevent a man from selling his property at less than its value—however impossible it might be to sell it at its value, however desirous he might be to sell it for the price actually obtained, however desirable it might be for his interest that he should do so, and however unwilling or unable the purchaser might be to purchase at its full value. The rule would, when it did not stop the sale, yet further reduce the amount receivable by the vendor, because the purchaser would, in effect, indemnify himself for the risk he ran by offering less purchase money than he otherwise would have done. The freedom of contract, including in it the freedom to enter into enforceable contracts, should never be infringed without sufficient cause. But furthermore, if inadequacy of consideration short of fraud were a bar to specific performance, the question would arise as to the amount of inadequacy which should so operate—a question not easy to answer.

§ **427**. In the later Roman law, these difficulties in the way of relieving against inadequacy of consideration in certain cases were overcome, at least as to immoveable property. By a constitution of the Emperors Diocletian and Maximian, the right of recission for inadequacy of consideration was first introduced.(*u*) Their constitution was adopted by Justinian. It fixed the arbitary standard of half the real price as that which would give the sufferer a right to the interference of the law; when the price paid did not amount to half the real value of the thing sold, the vendor might put the purchaser to his election, either to take back the purchase money and restore the thing sold, or to keep the thing, and make up the deficiency in the purchase money.(*v*) The old French law adopted the same

(*t*) Nott v. Hill, 2 Cas. in Ch., 120.
(*u*) Troplong, De la Vente, § 780.
(*v*) Cod. lib. iv, tit. 44, 2.

principle, except in the case of sales between co-heirs and co-proprietors, where a defect of one-quarter of the price had the same effect as a like defect of one-half in other cases.(*w*) The present law of France is embodied in article 1674 of the Code Civil, which is remarkable for the stringency of its provisions and for the discussion in the Counseil d'Etat of which it was the result, a discussion in which the first consul took a prominent part.(*x*) It enables a vendor of an immoveable to require recission, if he suffers injury to the extent of more than seven-twelfths of the price, though he may by the contract have expressly renounced such right, and have declared that the price given is the full value.

§ **428**. The question of the inadequacy of the consideration must, of course, be decided at the time of the contract, and not by the light of subsequent events.[1] It is true that, in a case(*y*) already stated, the circumstance of the contract having been made during the excitement caused by the South Sea scheme was allowed as a reason why the court relieved a purchaser from the performance of his contract; but the case is one which cannot now be considered as law, and the principle involved seems unjust. It is now, therefore, well established that the time of the contract is the time for judging of its consideration: thus, to give one example, where an annuity for life forms part of the consideration, and the life drops before any payment is made, this does not render the consideration necessarily inadequate.(*z*)

§ **429**. Where the contract refers the price to a valuer for him to ascertain between the parties, this fact does not of itself preclude the court from inquiring into the adequacy of the consideration,(*a*) and this inadequacy of consideration would, of course, be strengthened as a defense if any circumstances arose which threw a doubt on the accuracy with which the valuation was made.(*b*)

§ **430**. The effect of an undervaluing by the valuers is a

(*w*) Pothier, Tr. des Oblig., Part I, ch. 1, § 1, art. 3, § 4.
(*x*) Troplong, De la Vente, § 787 et seq.
(*y*) Saville v. Savile, supra, § 423. See Kien v. Stukeley, 1 Bro. P. C., 191, where the same ground was urged; but according to the report in Gilbert, the case was decided on another point.
(*z*) Mortimer v. Capper, 1 Bro. C. C., 156.
(*a*) Parken v. Whitby, T. & R., 366.
(*b*) Emery v. Wase, 8 Ves., 505.

[1] Batty v. Lloyd, 1 Vern., 141.

question which has, however, been but little discussed in our courts: it has been debated with the usual diversity of opinion by the writers on civil law.(c) It is conceived that, if the undervalue were such as to convince the court that the valuers had acted under fraud or mistake, the contract would be incapable of enforcement in equity: otherwise, if the undervalue did not so convince the court.

§ **431**. The question of inadequacy of consideration in a sale of reversionary interests, whether arising in a suit to set aside the sale or in a suit for the performance of the contract, was formerly governed by special considerations. The law upon this question has, to a certain extent, been altered by statute. It is necessary, therefore, to consider how the law stood before the legislative alteration, and what is the extent of that alteration.

§ **432**. Before the statute hereafter to be referred to, the defense of inadequacy of consideration in respect of contracts for the sale of reversions had two peculiarities which distinguished it from the like defense in the case of ordinary contracts. It was clear (1) that the proof of inadequacy was a sufficient defense, though there were no accompanying circumstances of fraud or oppression, and though the inadequacy did not amount to evidence of fraud;(d) (2) that the burthen of proof lay on the plaintiff purchaser: it rested on him to show that the price was adequate, not on the defendant vendor to show that it was inadequate.(e)

§ **433**. The principle on which the court acted in these cases was that a man possessed only of a future interest sells at a disadvantage; it, therefore, did not apply where the tenant for life and the reversioner concurred, as they together "form a vendor with a present interest;"(f) and so where a vendor had a rent-charge of £500 in possession and an estate in reversion, and he sold a perpetual rent-charge of £500, he was not considered as within the principle now under consideration, he having it in his power to secure a perpetual rent-charge of that amount in possession.(g)

§ **434**. The mere fact, however, that some interest in pos-

(c) Troplong, De la Vente, § 158.
(d) Playford v. Playford, 4 Ha., 546.
(e) Kendall v. Beckett, 2 R. & My., 88; Hincksman v. Smith, 3 Russ., 433.
(f) Wood v. Abrey, 3 Mad., 417.
(g) Wardle v. Carter, 7 Sim., 490.

session was sold together with the reversion, did not, at least where the former was not considerable, take the case out of the rule :(*h*) as, for instance, where an annuity in possession was sold together with the reversion, the estimated value of the annuity being only about one-sixth of that of the reversion.(*i*)

§ **435**. Again, the principle did not apply where the reversionary interest was sold by auction :(*j*) and this for two reasons. First, "there being no treaty between vendor and purchaser, there can be no opportunity for fraud or imposition on the part of the purchaser. The vendor is, in no sense, in the power of the purchaser."(*k*) Secondly, it being clearly established that the market price of the reversionary interest, and not the estimate of actuaries, was the criterion by which the court decided the question of undervalue,(*l*) and a sale by auction being a mode of ascertaining that market price, it followed that the consideration for the transaction and the value in the eye of the court must in such cases be one and the same, and that, in the absence of fraud, no question of undervalue could arise.

§ **436**. Such was shortly the state of the law before the statute 31 Vict., ch. 4. By that statute it was enacted that no purchase made *bona fide* and without fraud or unfair dealing of any reversionary interest in real or personal estate, should thereafter be opened or set aside merely on the ground of undervalue.

§ **437**. As regards actions for the rescission of contracts for the sale of reversions, the operation of this act is clear. It makes mere inadequacy no sufficient ground for relief; but it leaves entirely unaffected the jurisdiction which relieves against the fraud which infects catching bargains with heirs, reversioners, or expectants in the life of the father. The doctrines of the court which throw protection round unwary young men in the hands of unscrupulous persons ready to take advantage of their necessities are entirely unchanged.(*m*)

(*h*) Per Lord Eldon in Davis v. Duke of Marlborough, 2 Sw., 154.
(*i*) Earl of Portmore v. Taylor, 4 Sim., 182.
(*j*) Shelly v. Nash, 3 Mad., 232.
(*k*) Per Leach, V. C., id., 236.
(*l*) Wardle v. Carter, 7 Sim., 490; per Wigram, V. C., in Borell v. Dann, 2 Ha., 452; Earl of Aldborough v. Trye, 7 Cl. & Fin., 436, 460; Edwards v. Burt, 2 De G. M. & G., 55. Consider Porfect v. Lane, 30 Beav., 197; 3 De G. F. & J., 369; Lord v. Jeffkins, 35 Beav., 7.
(*m*) Tyler v. Yates, L. R. 11 Eq., 265; 6 Ch., 664; Earl of Aylesford v. Morris, id. 8 Ch., 484; Beynon v. Cook, 10 Ch., 389; O'Rorke v. Bolingbroke, 2 App. C., 814; Nevill v. Snelling, 15 Ch. D., 679.

§ **438**. But the act is silent as regards the specific performance of contracts relating to reversions. Does it, therefore, leave the law just as it was? or does it for all purposes place sales of reversions on the same footing as other sales so far as regards the question of inadequacy of consideration? No decision has, it is believed, been given upon these questions: but it is submitted that the true conclusion is, that every contract for the sale of a reversion which cannot be relieved against ought *prima facie* to be performed; that the object of the act was to place *bona fide* and honest sales of reversions on the same footing as other sales: and that henceforth in specific performance actions there will rest on the defendant the burthen of proving inadequacy of consideration, and such inadequacy as shocks the conscience of the court and constitutes evidence of fraud, or as is accompanied by other circumstances of oppression or unfairness.

§ **439**. It only remains to add as affording some support to this conclusion that the rule throwing the burthen of proof of adequacy on the purchaser was adopted in specific performance suits in obedience to decisions to that effect in suits to set aside the transaction; and not on any independent ground affecting such suits in particular.(*o*)

(*o*) See Kendall v. Beckett, 2 R. & My., 884; the cases there cited and relied upon in Hincksman v. Smith, 3 Russ., 433; and notice judgment.

CHAPTER VIII.

OF WANT OF MUTUALITY IN THE CONTRACT.

§ **410**. A contract to be specifically enforced by the court must be mutual—that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them.(*a*)[1] Whenever, therefore, whether from personal incapacity to contract, or the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former.[2]

(*a*) In Williams v. Williams, L. R. 2 Ch., 294, 304, there was held to be mutuality in a verbal family arrangement. Consider Turner v. May, 32 L. T. (N. S.), 56.

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[1] *Mutuality as to obligation and remedy.*] A contract which is sought to be specifically enforced must be mutual, both as to the remedy and the obligation. Boucher v. Vanbuskirk, 2 A. K. Marsh., 345; Hutchinson v. McNutt, 1 Ohio, 14; Ohio v. Baum, 6 id., 383; Cabeen v. Gordon, 1 Hill Ch. (S. C.), 51; McMurtree v. Bennett, Harr. Ch., 124; Hawley v. Sheldon, id., 420; Benedict v. Lynch, 1 John.'s Ch., 370; German v. Machin, 6 Paige Ch., 288; Beard v. Linthicum, 1 Md. Ch., 345; Bodine v. Gladding, 21 Pa. St., 50; Jones v. Noble, 3 Bush. (Ky.), 694; Rider v. Gray, 10 Md., 282; Reese v. Reese, 41 id., 554; O'Brien v. Pentz, 48 id., 562; Ewins v. Gordon, 49 N. H., 444; Richmond v. Dubuque R. R. Co., 33 Iowa, 422; Taw v. Scott, 4 Breu 's (Pa.), 49; Cooper v. Pena, 21 Cal., 403; Duvall v. Myers, 2 Md. Ch., 401; Meason v. Kane, 63 Pa. St., 335; Luse v. Deitz, 46 Iowa, 205; Maynard v. Brown, 41 Mich., 298; Smith v. Smith, 63 Ga., 184; Bronson v. Cohill, 4 McLean, 19; Snyder v. Neefus, 53 Barb., 63; Marble Co. v. Ripley, 10 Wall., 339; Mastin v. Halley, 61 Mo., 196; Vassault v. Edwards, 43 Cal., 458.

Option.] An optional contract to sell property, or renew a lease, without any covenant or obligation to purchase or accept, and without any remedy that is mutual, will be enforced by a court of equity, when it has been made upon proper consideration, or forms part of a contract between the parties, that may be the true consideration for it. Classon v. Bailey, 14 Johns., 484; In re Hunter, 1 Ed. Ch., 1; Woodward v. Aspenwall, 4 Sandf., 272; Hawralty v. Warren, 18 N. J. Eq., 124; Vandoren v. Robinson, 16 id., 256; Green v. Richards, 23 id., 32; Schroeder v. Gemeinder, 10 Nev., 355; Corson v. Mulvany, 49 Pa. St., 88; Boston, etc., R. R. Co. v. Bartlett, 3 Cush., 224; D'Arras v. Keyser, 26 Pa. St., 249.

Continuing offer to sell.] An agreement to sell, provided another will purchase, is in the nature of a continuing offer, and when accepted completes the contract. De Rutte v. Muldrew, 16 Cal., 505; Laffan v. Nagle, 9 id., 662; Hall v. Canter, 40 id., 65; Willard v. Taylor, 8 Wall., 557; Napier v. Darlington, 70 Pa. St., 64; Manlin v. Perry, 35 Md., 352.

[2] No rule in equity is more thoroughly settled than this. Benedict v. Lynch, 1 John. Ch., 370; Bromley v. Jeffers, 2 Vern., 415; German v. Machin, 6

§ **441**. Thus a tenant in tail cannot enforce a contract entered into by a tenant for life, because the tenant in tail could not be sued on it:(*b*) an infant cannot sue, because he could not be sued, for a specific performance:(*c*) a purchaser from a person who at the time of the sale had no estate in the property sold, may defend himself on the score of the vendor's original incapacity to perform his part:(*d*) a father cannot enforce a contract on the part of his mother-in-law to pay him an allowance in consideration of his giving up to her the custody of his infant children during a specified part of every year:(*e*) and where A. agreed with B. not to join in barring an entail, and B. agreed to convey to A. certain parts of the estate on his entering into possession, and it was held, on the authority of Collins v. Plummer,(*f*) that such a contract could not be specifically enforced against A., a specific performance of B.'s part of the contract was refused at the suit of A.'s representatives.(*g*) On the same principle it would seem that a contract entered into by several devisees in trust for sale, of

(*b*) Armiger v. Clarke, Bumb., 111; Rickett v. Bell, 1 De G. & Sm., 335.

(*c*) Flight v. Bolland, 4 Russ., 298. The case of Clayton v. Ashdown, 9 Vin. Abr., 393, may perhaps be explained on the ground of a ratification by the infant after attaining his majority, or as being an application in equity of the legal principle that the contract, though voidable by the infant, binds the party of full age. The infant cannot recover a deposit paid on the contract, except on the ground of fraud. Wilson v. Kearse, Peake, Add. Cas., 196.

(*d*) Hoggart v. Scott, 1 R. & My., 293. Cf. Forrer v. Nash, 35 Beav., 167.

(*e*) Kennedy v. May, 11 W. R., 358.

(*f*) 1 P. Wms., 104.

(*g*) Hamilton v. Grant, 3 Dow, 33.

Paige, 288; Woodward v. Harris, 2 Barb. S. C. R., 439; Phillips v. Berger, id., 611; confirmed on appeal, 8 id., 527; see, also, Rogers v. Saunders, 4 Md. R., 92; Tyson v. Watts, 1 Maryl. Ch. Decis., 13; Beard v. Linthicum, id., 345; M'Murtrie v. Bennet, Harring. Ch., 124; Hawley v. Sheldon, id., 420; Cabeen v. Gordon, 1 Hill. Ch., 51. In Bronson v. Cahill, 4 McLean, 19, a bill was brought in equity, by the vendors of certain land, to enforce specific execution of the contract of sale. It appeared, however, that a part only of the vendors had agreed to make a good and sufficient title to the land. Held, that there was a want of mutuality in the contract, and that specific execution could not be enforced. The same question arose in Tyson v. Watts, 1 Maryl. Ch. Decis. 13. There, the manifest object of the party resisting a decree for the specific performance of a contract, and one which he supposed he had secured by the contract, was to have the minerals on his farm worked as well as explored; by the contract he gave A. full power to make explorations and work the mines; but the only engagement on the part of A. was limited to explorations, and he was not bound to work the mines. Upon this state of the case the court decided the contract to be deficient in reciprocity of obligation, and refused its specific performance. A party not bound by the agreement itself, has no right to call upon a court of equity to enforce specific performance against the other contracting party, by expressing his willingness, in his bill, to perform his part of the engagement. His right to the aid of the court does not depend upon his subsequent offer to perform the contract on his part, but upon its original obligatory character. Duvall v. Myers, 2 Md. Ch. Decis., 401; see, also, the case of Bodine v. Gladding, 21 Penn. (9 Harris), 50.

whom one was a married woman, would be unenforceable by either side.(*h*) So where the relief sought was analogous to the specific performance of a grant of an office, the court held that, the duties and services incident to the office being personal and confidential in their character, specific performance could not have been decreed against the plaintiff at the suit of the defendant; and consequently, that the plaintiff could not sue the defendant, though there were no personal duties to be performed by the defendant.(*i*) Again, where the plaintiffs had agreed to perform certain services in working a railway, which were of such a confidential nature that the court could not have enforced them if the defendants had sued the plaintiffs; and the defendants were to pay money, and do nothing else; the court refused specific performance, on the ground, amongst others, of want of mutuality.(*j*) The like objection prevailed where the plaintiff sued on a contract under which he was to construct a railway, and offered to make the railway and asked for payment.(*k*)

§ **442**. A doubt was at one time entertained whether there existed the proper mutuality between a person having entered into a contract to take a lease from a tenant for life with a leasing power and the remainderman:(*l*) but that doubt is now resolved, and it seems clear that such a contract may be enforced by either of these parties.(*m*)

§ **443**. The mutuality of a contract is, as we have seen, to be judged of at the time it is entered into; so that it is no objection to the plaintiff's right, that the defendant may by delay, or other conduct on his part subsequent to the contract, have lost his right against the plaintiff.(*n*)[1] And ac-

(*h*) That the purchaser could not enforce such a contract has been decided. Avery v. Griffin, L. R. 6 Eq., 606.

(*i*) Pickering v. Bishop of Ely, 2 Y. & C. C. C., 249.

(*j*) Johnson v. Shrewsbury and Birmingham Railway Co., 3 De G. M. & G., 914; Stocker v. Wedderburn, 3 K. & J., 393; Ord v. Johnston, 1 Jur. (N. S.), 1063; 4 W. R., 37 (Stuart, V. C.). See, also, Hill v. Gomme, 1 Beav., 540; Bromley v. Jefferies, 2 Vern., 415, *sed qu.* It has been decided in Ireland that a contract by a purchaser with a husband and wife is not bad for want of mutuality, and may be enforced by them. Fenelly v. Anderson, 1 Ir. Ch. R., 706. The grounds of this decision do not appear very conclusive. Cf. Avery v. Griffin, L. R. 6 Eq., 606.

(*k*) Peto v. Brighton, Uckfield, and Tunbridge Wells Railway Co., 1 H. & M., 468.

(*l*) Per De Grey, C. J., in Campbell v. Leach, Ambl., 749.

(*m*) Shannon v. Bradstreet, 1 Sch. & Lef., 52, particularly 64. See infra, § 566.

(*n*) South Eastern Railway Co. v. Knott, 10 Ha., 122.

[1] And the rule which applies to cases in which there is not such mutuality of remedy at the time the contract is made, is not applicable to cases in which the mutuality of remedy is taken away by a subsequent contingent event. Moore v. Fitz Randolph, 6 Leigh, 175. See Walton v. Coulson, 1 McLean, 120, which is a case agreeing precisely with the Southeastern Railway Co. v. Knott, cited in the text.

cordingly it has been held to be no defense on the part of a railway company for them to show that they had after the contract suffered the time during which, by their statutory powers, they could purchase the lands to expire:(*o*) if such a defense were sustained, it would be to allow defendants to take advantage of their own neglect. From the time of the execution of the contract being the time to judge of its mutuality it further follows, that the subsequent performance by one party to terms which could not have been enforced by the other will not prevent the objection which would arise from the presence of such terms.(*p*)

§ **444**. The exceptions or apparent exceptions and limitations to the doctrine of mutuality may now be considered.

§ **445**. (1) The contract may be of such a nature as to give to the one party a right to the performance which it does not give to the other—as for instance, where a lessor covenants to renew upon the request of his lessee:(*q*) or where the contract is in the nature of an undertaking.(*r*) But these are merely cases of conditional contracts: and when the condition has been performed, as for instance, in the case above stated, by a request to renew, the contract becomes absolute and mutual and capable of enforcement alike by either party.(*s*)

§ **446**. In cases arising out of such contracts, the court will exercise its discretion as to specific performance with great care, and, it seems, view even somewhat narrowly the conduct of the party claiming the benefit of his unilateral right to make the contract absolute.(*t*)

§ **447**. (2) Mutuality may be waived by the subsequent conduct of the person against whom the contract could not originally have been enforced: thus, where a purchaser contracts for an estate with a person having no title, or not such as he affects to sell, and the contract, therefore, is not mutual, for want of interest in the vendor—yet, if the pur-

(*o*) Hawkes v. Eastern Counties Railway Co., 1 De G. M. & G., 737, 755; S. C., 5 H. L. C., 331, 365. The observations of Lord Cranworth (then L. J.) in Stuart v. London and North-Western Railway Co., 1 De G. M. & G., 721, to the contrary, may probably be taken to be overruled by his lordship's concurrence in Hawkes' Case in the House of Lords. See, also, Scottish North-Eastern Railway Co. v. Stewart, 3 Macq., 382, where, however, the point really determined was one of construction.

(*p*) Hope v. Hope, 8 De G. M. & G., 731, 746, overruling the observations of Lord Romilly, M. R., in S. C., 22 Beav., 364.

(*q*) Chesterman v. Mann, 9 Ha., 206. See Bell v. Howard, 9 Mod., 302, 304.

(*r*) Palmer v. Scott, 1 R. & My., 391.

(*s*) Cf. Weeding v. Weeding, 1 J. & H., 424, where a conditional contract had become absolute by the exercise of an option of purchase. Consider Alderson v. Maddison, 5 Ex. D., 293, 306 (reversed W. N., 1881, p. 68).

(*t*) Chesterman v. Mann, 9 Ha., 206.

chaser investigate the title and make requisitions or concur in proceedings for the purpose of remedying the defect, he is afterwards precluded from setting up the original want of mutuality in the contract.(*u*)

§ **448**. And so where, from the relation of the parties to one another, the contract is originally binding on the one and not on the other, the latter may by action waive that want of mutuality, and enforce the specific performance of the contract; as in the case of an action by a *cestui que trust* against his trustee for the performance of a contract for sale, such a contract being originally binding on the trustee, and not on the beneficiary.(*v*) The case of a contract for sale by a voluntary settler is similar, for though he is incapable of enforcing the contract against an unwilling purchaser,(*w*) the purchaser may waive the want of mutuality and enforce it against him.(*x*)

§ **449**. (3) Another apparent exception to the principle in question is afforded by the doctrine which was established very soon after the passing of the Statute of Frauds, that in case of contracts which by that statute are required to be in writing, a party who has not signed the contract may enforce it against one who has.(*y*)[1]

§ **450**. It has been alleged in support of this doctrine, in the first place, that the statute only requires the contract to be signed by the party to be charged therewith or his agent, and is silent as to the signature of the other party.(*z*) But this reasoning seems inconclusive; because the doctrine of mutuality is independent of the statute, and where one party has signed and the other has not, the rights of the

(*u*) Sallsbury v. Hatcher, 2 Y. & C. C. C., 54; Horgart v. Scott, 1 R. & My., 293.

(*v*) Ex parte Lacey, 6 Ves., 625.

(*w*) Smith v. Garland, 2 Mer., 123; Johnson v. Legard, T. & R., 281; Clarke v. Willott, L. R. 7 Ex., 313. In Peter v. Nicolls, L. R. 11 Eq., 391, Stuart, V. C., held that the rule established by Smith v. Garland did not apply to a purchaser who admitted that he was a willing purchaser, but objected to the title. See supra, § 387, and note there.

(*x*) Buckle v. Mitchell, 18 Ves., 100; and see Rosher v. Williams, L. R. 20 Eq., 210.

(*y*) Hatton v. Grey, 5 Vin. Abr., 525, pl. 4, in 36 Car. ii; S. C., 2 Cas. in Ch., 164; Buckhouse v. Crosby, 2 Eq. Ca. Ab., 32, pl. 44; and see, as to the interest of the party who has not signed, Morgan v. Holford, 1 Sm. & Giff., 101. See, too, infra, § 497.

(*z*) Coleman v. Upcot, 5 Vin. Abr., 527, pl. 17; Child v. Comber, 3 Sw., 423 n.; Backhouse v. Mohun, id., 434 n.; Seton v. Slade, 7 Ves., 265; Lord Ormond v. Anderson, 2 Ball & B., 363.

[1] In support of this exception, see Seton v. Slade, 7 Ves., 275; Fowle v. Freeman, 9 id., 357; Clason v. Bailey, 14 John. Rep., 184; McCrea v. Purdy, 16 Wend., 406; Woodward v. Aspinwall, 3 Sandf. S. C. R., 272; Sutherland v. Briggs, 1 Hare, 34. But see the comments of Lord Redesdale in Lawrence v. Butler, 1 Sch. & Lef., 13; and of Verplanck, senator, in Davids v. Shields, 26 Wend., 362.

parties, which before the statute were mutual, have by force of it ceased to be such.(*a*) A more satisfactory reason is that, by instituting proceedings, the plaintiff has waived the original want of mutuality, and rendered the remedy mutual.(*b*)

§ **451**. On the same ground, a contract contained in a deed-poll was enforced, notwithstanding an objection taken from the unilateral nature of the instrument.(*c*)

§ **452**. (4) Where the vendor has not substantially the whole interest which he contracted to sell, he cannot enforce the contract against the purchaser, and yet the purchaser can generally enforce it against him by compelling him to convey what he can, with an abatement of the purchase-money as compensation for the deficiency. This subject will be found discussed in a subsequent chapter.(*d*)

§ **453**. In two Irish cases decided by Lord Redesdale, in each of which the party seeking to enforce the contract was at the time when he entered into it aware of the defect in the other party's title,(*e*) the principle stated in the last preceding section was held not to apply.

§ **454**. In one of these cases, a tenant for life entered into a contract with the plaintiff to grant a lease, which he could not do without the consent of trustees:(*f*)[1] the consent was refused, the contract being in fact intended to give a fine to the tenant for life in fraud of the power: the intended lessee filed his bill against the tenant for life, and contended that he was at least entitled to such a lease as the tenant for life could grant out of his estate. But Lord Redesdale dismissed the bill for want of mutuality. "No man," he said, "signs an agreement but under a supposition that the other party is bound as well as himself: and, therefore, if the other party is not bound, he signs it under a mistake;"(*g*)

(*a*) See per Leach, V. C., in Boys v. Ayerst, 6 Mad., 323.

(*b*) Child v. Comber, 3 Sw., 423 n.; Seton v. Slade, 7 Ves., 265; Fowle v. Freeman, 9 id., 351; per Grant, M. R., in Western v. Russell, 3 V. & B., 192; Martin v. Mitchell, 2 J. & W., 413; Flight v. Bolland, 4 Russ., 298.

(*c*) Otway v. Braithwaite, Finch, 405. So, also, of a bond, Butler v. Powis, 2 Coll., 156.

(*d*) Part IV, chap. ii, § 1222 et seq.

(*e*) That this circumstance is not necessarily fatal to relief, see infra, § 1232; Barker v. Cox, 4 Ch. D., 464.

(*f*) Lawrenson v. Butler, 1 Sch. & Lef., 13.

(*g*) 1 Sch. & Lef., 21.

[1] "Where the vendor has contracted to convey a tract of land, the title to a part of which fails, the vendee may claim a specific performance of the contract as to the residue of the land, with a compensation in damages in relation to which the vendor is unable to give a good title." Morss v. Elmendorf, 11 Paige, 287.

and his lordship considered that the principle above stated only applies where, on the faith of a contract, one party has put himself in a situation from which he cannot extricate himself, and is, therefore, willing to forego part of his contract—where an injury would be sustained by the plaintiff, unless he were to get such an execution of the contract as the defendant could give. In the other case, Lord Redesdale further observed upon the specific performance of contracts by a tenant for life exceeding his power.(*h*) "I think," said his lordship, "courts of equity should never enforce such contracts, whether with a view to the party himself or to the person entitled in remainder. In the first place, it is unconscionable in the tenant for life to execute such a lease, because it brings an incumbrance on the estate of the remainderman, and puts him to litigation to get rid of it: and as to the tenant for life himself, it is compelling him to do what is to be the foundation of a future action for damages, if he die before the twenty-one years. The court will never do this, but will leave the party at once to bring his action for damages. And I also conceive that this sort of contract, obtained by a person who knew at the time the nature of the title, is unconscionable in him, as he makes himself a party knowingly to that which is a fraud on the remainderman; and, under such circumstances, he has no claim to the assistance of a court of equity."(*i*)

§ **455**. This view of the jurisdiction is certainly narrower than that entertained by previous judges: it has been remarked to be such by Lord Langdale, M. R.,(*j*) and has been disapproved of by Lord St. Leonards. "I doubt," said his lordship, speaking of Lord Redesdale's dismissal of the bill in the first of the cases above alluded to, "whether that can be maintained as the law of the court where there is no fraud in the transaction. If there be a *bona fide* intention to execute the power, and the contract cannot be carried into effect, I do not see why the interest of the tenant for life should not be bound to the extent he is able to bind it, unless there be some inconvenience."(*k*) And the principle

(*h*) Harnett v. Yielding, 2 Sch. & Lef., 549; contra, Neale v. Mackenzie, 1 Ke., 474.
(*i*) 2 Sch. & Lef., 559. See, also, 553.
(*j*) In Thomas v. Dering, 1 Ke., 746.
(*k*) Dyas v. Cruise, 2 J. & Lat., 460, 487.

thus stated is now firmly established, notwithstanding the objection for want of mutuality.(*l*)[1]

(*l*) See infra, Part IV, chap. ii, § 1222 et seq.

[1] "It is also perfectly evident," it is added by Walworth, Chancellor, in Morss v. Elmendorff, 11 Paige, 288, "in this case, that the complainant, at the time he filed his bill, was aware that the supposed gore had no existence, and that no specific performance of the agreement could be obtained in this court. And in a case of that kind, Chancellor Kent correctly decided that this court ought not to entertain the suit merely for the assessment of damages. Hatch v. Cobb, 4 John. Ch., 559; Kempshall v. Stone, 5 id., 193. But where the defendant deprives himself of the power to perform the contract specifically, during the pendency of a suit to compel such performance, this court may very properly retain the suit, and award the complainant a compensation in damages, to prevent a multiplicity of suits. And I am not prepared to say that such a decree might not be proper, where the defendant had deprived himself of the power to perform the contract prior to the filing of the bill, but without the knowledge of the complainant; or even where he had never had the power to perform, if the complainant had filed his bill in good faith, supposing at the time he instituted his suit here that a specific performance of the contract could be obtained under the decree of this court. But this court does not entertain jurisdiction where the sole object of the bill is to obtain a compensation in damages for the breach of a contract, except where the contract is of equitable cognizance merely. Nor can a complainant entitle himself to the interference of this court, to give him a compensation in damages for the non-performance of a contract, by neglecting to state in his bill, that the defendant is unable to perform the contract specifically; where that fact is known to him at the time of filing his bill in this court. For if the facts which were then known to him had been fully stated in his bill, the defendant might have demurred, upon the ground that the complainant's remedy, if any he had, was at law and not in equity. Or he might have raised that objection in his answer. In this case, therefore, the complainant's bill cannot be retained for the purpose of obtaining a compensation in damages merely, when he knew that he could expect nothing more than such a compensation in damages at the time of filing his bill. And the complainant having made a case, by his bill, apparently entitling him to a specific performance, he cannot now insist that the defendant has waived the objection, that the remedy of the complainant was at law; because he did not demur to the bill, or state that objection in his answer."

CHAPTER IX.

OF THE ILLEGALITY OF THE CONTRACT.

§ **456.** The illegality of a contract or of any part of a contract is, of course, a bar to its specific performance, as well as to every other proceeding by which either of the parties may seek to enforce it.(*a*) The interference of the court is prevented, whether the contract was illegal at the time of its being entered into, or was then legal but has been rendered illegal by subsequent statute law before its execution.(*b*) But in the latter case the court is, it seems, anxious to find some means of executing the contract so far as it may be done without violating the law.(*c*)[1]

(*a*) See infra, § 464.
(*b*) Atkinson v. Ritchie, 10 East, 530, 534; Barker v. Hodgson, 3 M. & S., 267; Esposito v. Bowden, 4 El. & Bl., 963. See, also, Winnington v. Briscoe, 8 Mod., 51; and infra, § 894.
(*c*) Bettesworth v. Dean of St. Paul's, Sel. C. in Ch., 66; infra, § 986.

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[1] *Rule as laid down by Walworth, Ch.* (in Pratt v. Adams, 7 Paige's Ch., 615.)] "It is a well-settled principle of the common law, that no court of justice will lend its aid to enforce the performance of any contract or agreement which was intended by the parties thereto to contravene to provisions of a positive law, or the performance of a contract which is contrary to public policy." Consult, under this head, Knowles v. Harylton, 11 Ves., 168; Ewing v. Oshaldistone, 2 Myl. & Cr., 53; De Beguis v. Armistead, 10 Bing., 107; Gas-light Co. v. Turner, 7 Scott, 779; Wethenil v. Jones, 3 B. & A., 221; Seidenbender v. Charles, 4 Serg. & Rawle, 159; Hall v. Mullin, 5 Har. & Johns., 193; Scott v. Duffy, 14 Pa. St., 18; Boutwell v. Foster, 24 Vt., 485; Brian v. Williamson, 7 How. (Miss.), 14; Buxton v. Hamblin, 32 Me., 448. Even where the parties consent, such a contract cannot be decreed. Fowler v. Scully, 72 Pa. St., 456. It cannot be enforced, even if after the making of the contract the statute has been repealed. In such case the court will carry out the intention of the parties, so far as it can do so without a violation of law. Galliland v. Phillips, 1 S. C., 52; Bettersworth v. Dean of St. Paul, Sel. Cas. in Ch., 66.

Contract in contravention of public policy.] "The power to declare a contract void for being in contravention of sound public policy, is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, it should be exercised only in cases free from doubt." Richmond v. Dubuque R. R. Co., 26 Iowa, 191.

Parties to the contract not equally guilty.] The court will afford relief to the more innocent party, where equity requires it; unless, however, the parties to a contract sought to be specifically enforced are *in pari delicto*, as well as *particeps criminis*. "Where both parties are *in delicto*, concurring in an illegal act, it does not always follow that they stand *in pari delicto*, for there may be, and often are, very different degrees in their guilt. One party may act under circumstances of oppression, imposition, hardship, undue influence or great inequality of age or condition, so that his guilt may be far less in degree than that of his associate in the offense. And besides there may be, on the part of the court itself, a necessity of supporting the public interest, or public policy, in

§ **457**. In the case of foreign contracts, they must, in order to be enforced here, be legal according to the law of this country; and this notwithstanding that such foreign contracts may have been made with a view to performance abroad and to foreign laws. It is not enough that they are valid according to the law of the country where they were made. For "when the courts of one country are called upon to enforce contracts entered into in another country, the question to be considered is not merely whether the contract sought to be enforced is valid according to the laws of the country in which it was entered into, but whether it is consistent with the laws and policy of the county in which it is sought to be enforced."(*d*)

§ **458**. What constitutes illegality in all the various species of contracts which may exist between man and man is a subject of enormous dimensions, regulated in part by the statute law of the realm, in part by considerations of public policy,(*e*) and in part even by the rules which the courts have adopted for the general protection of all suitors.(*f*)[1]

(*d*) Hope v. Hope, 8 De G. M. & G., 731, 743; per Lord Ellenborough, C. J., in Potter v. Brown, 6 East, 131.

(*e*) As to this class, see Egerton v. Lord Brownlow, 4 H. L. C., 1, and the cases there collected.

(*f*) Cooth v. Jackson, 6 Ves., 12.

many cases, however reprehensible the acts of the parties may be. Stories' Eq. Jur., § 300; Browning v. Morris, 2 Cowp., 790; Osborne v. Williams, 18 Ves., 379; Smith v. Bromley, 2 Doug., 696; Wheaton v. Hibbard, 20 John., 290; Deming v. State, 23 Ind., 416; Scotton v. State, 51 id., 52; Sandfoss v. Jones, 35 Cal., 481; Reynell v. Sprye, 21 L. J. Chan., 631, 651; Tracy v. Talmage, 14 N. Y., 162; Freelove v. Cole, 41 Barb., 318; Ford v. Harrington, 16 N. Y., 285; Lowell v. Boston and Lowell R. R. Co., 23 Pick., 24; Mount v. Waite, 7 John., 434; Atlas Bank v. Nahant Bank, 3 Met., 581.

Consideration unlawful.] The illegality may refer to either the consideration or to any of the stipulations of an agreement. A contract will not be specifically enforced, which grew immediately out of, or is connected with, an act or other contract which is immoral or illegal. Paton v. Stewart, 78 Ill., 481; Whittaker v. Bond, 63 N. C., 290; Armstrong v. Talor, 11 Wheat., 258; Wilson v. Spencer, 1 Rand., 76; Bowman v. Cunningham, 78 Ill., 48; Dodson v. Swan, 2 W. Va., 511

[1] Cases of illegality of contract proceed in violation of public policy or of some fixed and artificial rule of the law, and are, therefore, considered as analogous with cases of constructive fraud; which, "although not originating in any actual evil design or contrivance to perpetuate a fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and, therefore, are prohibited by law, as within the same reason and mischief, as acts and contracts done *malo animo*." Story's Eq. Jur., § 258; see Chesterfield v. Jansen, 2 Ves., 125; Newland on Contracts, ch. 33, p. 469; Osmond v. Fitzroy, 3 P. Will., 131 (note).

Cases of illegality of contract.] Foremost in contracts of this nature are agreements respecting marriage, known as marriage brokage contracts, by which a party agrees, for a certain compensation, to negotiate a marriage for the other.

It will be needful here only to enter into the subject so far as it peculiarly affects actions for specific performance.

§ 459. The nature of a defense founded on the illegality

Courts of equity relieve against them, on grounds of public policy. Drury v. Hook, 1 Vern., 412; Key v. Bradshaw, 2 id., 102; Duke of Hamilton v. Mohun, 2 id., 652; Keaf v. Allen, id., 588; Toche v. Atkins, 1 id., 451; Gale v. Lincoln, id., 475; Kemp v. Coleman, 1 Selk., 156; Baker v. White, 2 Vern., 215; Boynton v. Hubbard, 7 Mass., 112. They are deemed incapable of confirmation, and money paid under them may be recovered. Cole v. Gibson, 1 Ves., 503; Smith v. Bruning, 2 Vern., 392. See, also, the case of Williamson v. Gihon, 2 Sch. & Lefr., 355, in which the doctrine of the court was carried to its utmost limits.

Contracts in restraint of marriage are void.] England v. Downs, 2 Beav., 542; Conrad v. Williams, 6 Hill, 445; Hailley v. Rice, 10 East, 22; Lowe v. Peers, Burrows, 2225; Baker v. White, 2 Vern., 215; see, also, Woodhouse v. Shipley, 2 Atk , 535; Key v. Bradshaw, 2 Vern., 102. But conditions, annexed to gifts, legacies and devises, in restraint of marriage, are not void, if they are reasonable in themselves and do not directly or virtually operate on an undue restraint upon the freedom of marriage. Story's Eq. Jur., § 280. Neither is it any objection to a contract that, by its terms, it postpone the day of marriage, provided that the postponement be not unreasonable. Scott v. Tyler, 2 Dick., 719; Stackpole v. Beaumont, 3 Ves., 96.

A condition that a widow shall not marry, it is said, is not unlawful. Story's Eq. Jur., § 285.

Contracts in restraint of trade are also void.] Mitchell v. Reynolds, 1 P. Will., 181; Pierce v. Fuller, 8 Mass. Rep., 223; but contracts in restraint of trade in a particular vicinity are valid. Webb v. Noah, Edw. Ch., 604.

Agreements whereby parties agree not to bid against each other at public auction sales are void. Jones v. Caswell, 3 John. Cas., 29; Doolin v. Ward, 6 John. R., 194; Wilbur v. Howe, 8 id., 444; see Piatt v. Oliver, 2 McLean, 267.

Where contracts are entered into between parties pending a bill in parliament for the charter of a corporation for private purposes (as, for example, a railway), and the agreement is to be concealed from parliament, in order to procure the bill to be passed without the knowledge thereof, and thereby to produce a false impression, or to mislead or suppress inquiry, or to withdraw public opposition therefrom, on grounds of public or private general interest, such contracts will be held void, as a constructive fraud upon parliament, as well as upon the public at large. Story's Eq. Jur,, § 293, and note 3 of cases.

An agreement made for a remuneration to commissioners, appointed to take testimony, and bound to secrecy by the nature of their appointment, upon their disclosure of the testimony so taken, is void. Cooth v. Jackson, 6 Ves., 12.

An assignment of the fees and profits of the office of keeping a house of correction, and of the profits of the tap-house connected with it, is void. Wethwold v. Halbank, 2 Ves., 238.

An assignment of the half pay of a retired officer of the army is void. Stone v. Lidelledale, 2 Anst., 533; McGarty v. Goold, 1 Ball and Beat., 389.

Agreements founded upon the suppression of criminal prosecutions, fall under the same consideration. Johnson v. Ogiliby, 3 P. Will., 276, and note (1).

Wager contracts which are against the principles of public policy or duty, are void. De Costar v. Jones, Coop., 729; Atherford v. Beard, 2 Y. Rep., 610; Gilbert v. Sykes, 16 East, 150; Story v. Salmon, 71 N. Y., 420.

So are contracts which tend to encourage champerty.] Powler v. Knowler, 2 Atk., 224.

Contracts for the buying, selling or procuring of public offices are void. Chesterfield v. Janseen, 2 Ves., 124; Hartwell v. Hartwell, 4 id., 811; Boynton v. Hubbard, 7 Mass. R., 119; see Becker v. Ten Eyck, 6 Paige, 68. The question as to what is a wager contract of wheat, etc., depends upon the question as to whether the intention was to deliver or not. Bigelow v. Benedict, 9 Hun, 429.

of a contract differs in its nature from most other defenses: the objection is rather that of the public speaking through the court, than of the defendant as a party to the ac-

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Agreements founded on corrupt considerations, or moral turpitude, are void. Hence, all agreements, bonds and securities, given as a price for future illicit intercourse (*præmium pudoris*) or the commission of a public crime, as for the violation of a public law, or for the omission of a public duty, are deemed incapable of confirmation or enforcement. Story's Eq. Jur., § 296, and note of cases.

Contracts affecting public elections are void: so are assignments of rights of property, *pendente lite*, when they amount to or partake of the charcter of maintenance or champerty. Waller v. Duke of Portland, 3 Ves., 494; Stevens v. Bagwell, 15 Ves., 139; Strachan v. Bander, 1 Eden's R., 303.

In cases of usury, where the lender coming into a court of equity, asks for relief, it will be denied him, and the contract held as void. Story's Eq. Jur., § 301; Fanning v. Dunham, 5 John. Ch., 122.

Cases relating to gaming contracts are void, and equity will decree the giving up and cancelling of gaming securities. Robinson v. Bland, 2 Burr., 1077; Rawdon v. Shadwell, Ambler's R., 269; Woodruff v. Farnham, 2 Vern., 291; Skipwith v. Strother, 3 Rand., 214; Woodson v. Barrett, 2 Hen. & M., 80; Dade v. Madison, 6 Leigh, 401. It would seem, however, that different views are held in the various States. In Roberts v. Taylor, 7 Porter, 251, it is decided that where money has been lost by gaming, *but not paid*, equity will interfere to prevent its collection, as between the original parties to the contract. In Alabama, it is held that an action will not lie to recover money lost on a wager. Tyndall v. Childress, 2 Stew. & Port., 250. But it seems that the loser of notes may, in that State, maintain a bill to restrain their transfer by the winner, and prosecution of suit thereon, and this though they were passed by delivery. Parker v. Callihan, 5 Ala., 708. In Gill v. Webb, 2 Monr., 4, A. lost money at the gaming table to B., who, at the same sitting, lost the same amount to C. A. gave his note for the amount to C. A. paid part of the note to G., to whom it had been transferred. Held, that a judgment at law for the balance was properly enjoined, but that a decree for the repayment of the amount paid over was erroneous and should be reversed. The same doctrine is repeated in Lyon v. Respass, 1 Litt., 133; in Smith v. Davidson, 6 J. J. Marsh., 539, and in Downs v. Quarles, 6 Litt., 489. These cases precisely correspond with the ruling of Lord Talbot, who, on one occasion, expressed himself to the effect that a court of equity should not intermeddle for the recovery of money paid over, between two men who deliberately sat down for the purpose of ruining one another. Bosynanet v. Dashwood, Cas. Tem. Talb., 40; Rawdon v. Shadwell, Amb. R., 269. In McKimvey v. Pope, 3 B. Monr., 93, it is decided, however, in unison with the more recent English rule, that money lost at gaming may be recovered, if the bill is brought within five years of the time of the loss. Money, knowingly lent for the purpose of gaming, it has been held in England, is not recoverable. McKimmell v. Robinson, 3 Mees. & Welsb., 434. There are, also, many cases of this nature, which, though of themselves, are not illegal, yet become so by the relative positions of the parties concerned. They may arise under all circumstances, and in many different phases; and, therefore, whenever cases come before the court in which the parties are placed in situations of peculiar confidence toward each other, or where there exists fiduciary relations of an important nature, great care is taken to ascertain whether or not one party has become a victim of the deceit or imposition of the other; and if any mark of direct fraud be discovered, or if it appears that one party has, for his own advantage, sacrificed those interests which he is bound to protect, he will not be permitted to hold any such advantage. Story's Eq. Jur., §§ 307, 323; Griffiths v. Robins, 3 Madd., 191. Thus, contracts between parent and child, solicitor and client, guardian and ward, trustee and *cestui que trust*, and principal and surety, are watched with the closest scrutiny, and that held to be fraudulent in contracts between them,

tion. The law disallows all proceedings in respect of illegal contracts, not from any consideration of the moral position and rights of the parties, but upon grounds of public policy.[1] For if A. and B. enter into a contract for some

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which, under other circumstances, would be considered as unquestionable. Story's Eq. Jur., § 307 to § 327. There is another class of cases in which relief is granted, on the ground of constructive fraud, or illegality, even where no positive fraud infects the contract; and this is where the parties stand, in some sort, under the protection of the law, either by youth, extreme age, character or relationship. Thus, the interests of sailors are always treated with indulgence. See Story's Ex. Jur., § 322; opinion of Lord Stowell, in the Juliana, 2 Hagg. Adm. Rep., 504. Neither will relief be denied where the contract is substantially a fraud upon the rights, interests, duties or intentions of third persons. See Chesterfield v. Janssen, 2 Ves., 156. It is upon this ground that relief has been granted in what are called catching bargains with heirs, reversioners and expectants, during the life of their parents or other ancestors; 1 Foubl. Eq. B. 1; ch. 2, § 12, and note (k); Davis v. Duke of Marlborough. "There is always a fraud presumed," says Lord Hardwicke, in Chesterfield v. Janssen, "or inferred from the circumstances or conditions of the parties contracting, from weakness on the one side, and usury on the other, or extortion or advantage taken of that weakness. There has always been an appearance of fraud from the nature of the bargain, even if there be no proof of any circumvention, but merely from the intrinsic unconscionableness of the bargain. In most of these cases have occurred deceit and illusion in other persons, not privy to the fraudulent agreement. The father, ancestor or relation from whom was the expectation of the estate, has been kept in the dark. The heir or expectant has been kept from disclosing his circumstances, and resorting to them for advice, which might have tended to his relief and also reformation. This misleads the ancestor, who has been seduced to leave his estate, not to his heir or family, but to a set of artful persons who have divided the spoil beforehand." See, also, Tuistleton v. Griffith, 1 P. Will., 310; Cole v. Gibbons, id., 293; Baugh v. Price, 1 Hill's R., 320; Barnardiston v. Lingwood, 2 Atk., 235; Bowes v. Heaps, 3 Ves. & Bea., 117; Halmerly v. Booth, 2 Atk., 27; 1 Madd. Ch. Pr., 97. "Hence it is that, in all cases of this sort, it is incumbent upon the party dealing with the heir, or expectant, or reversioner, to establish not merely that there is no fraud, but (as the phrase is) to make good the bargain; that is, to show that a fair and adequate consideration has been paid. For in cases of this sort (contrary to the general rule) mere inadequacy of price or compensation is sufficient to set aside the contract. The relief is granted upon the general principle of mischief to the public, without requiring any particular evidence of imposition, unless the contract is shown to be above all exception. But it is not necessary, in cases of this kind, to establish in evidence, that the full value of the reversionary interest or other expectancy has been given according to the ordinary tables for calculations of this sort. It will be sufficient to make the purchase unimpeachable, if a fair price be given therefor, at the time of delivery." Story's Eq. Jur., § 336, and notes 1, 2, 3, 4. Contracts of this nature are, of course, not void, but merely voidable.

Another class of constructive frauds upon the rights of third persons, embraces all those agreements which operate directly, or virtually to delay, defraud or deceive creditors. The statute of 13 Elizabeth, ch. 5, as to creditors, which has been universally adopted in America, declares all fraudulent conveyances to be void. The validity of a conveyance depends, in these cases, upon the sufficiency of the consideration. If that be adequate, equity will not interfere upon the ground of constructive fraud. Story's Eq. Jur., § 353.

[1] *Public policy; examples of contracts void as against.*] The procuring of legislation by improper means; personal influence with the member is such. Marshall v. Baltimore and Ohio Railroad Co., 16 How., 314; Chippinger v. Hopbaugh, 5 Watts & Serg., 315; Rose v. Truax, 21 Barb., 361; Usher v. McBratney, 3 Dil., 385. An agreement which promised

illegal act to be performed by A., to which both are alike privy, and A. do his part in the business. B. has, it seems, no moral right to refuse performance of his part, provided there be nothing immoral in that part abstracted from the general end of the contract; as, for instance, if, under a contract to ship goods contrary to law, A. ship the goods, B. has no ground in natural equity for refusing to pay the stipulated price: A. and B. were equal in the culpability of the contract, but B. does a fresh wrong by refusing payment:(*g*) but it is a wrong for which no remedy is afforded by the law, for *ex dolo malo non oritur actio.* "It is not for his (the defendant's) sake," said Lord Mansfield, C. J., "that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the

(*g*) There is a difference of opinion amongst the jurists as to the binding nature of the promise, in the case above stated, *in foro conscientiæ;* though all agree that it cannot be enforced. See Grot. de Jur. Bell. ac Pac. lib. ii, c. xi, s. 9; Pothier, Tr. des Oblig., Part I, chap. 1, sect. 1, art. 3, § 6.

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to pay another for procuring a government contract for furnishing supplies. Tool Co. v. Norris, 2 Wall., 45. That a public officer should resign in order that another should have his office. Parsons v. Thompson, 1 H. Bl., 322: Eddy v. Capron, 4 R. I., 395. That one officer should exchange his office with another. Stroud v. Smith, 4 House (Del.), 448. A contract that aid should be given to obtain the appointment to office of a third party. Gray v. Hook, 4 N. Y., 449. That a bid will not be made for the labor of convicts. Gibbs v. Smith, 115 Mass., 592. That signatures shall be procured to a pardon, and the same obtained from the executive. Hatzfield v. Golden, 7 Watts, 152. A railroad company's contract that they will not maintain a depot at or near a given place. St. Joseph R. R. Co. v. Ryan, 11 Kan., 602. To pay the agents of a railroad company a given sum, provided they locate the road in a given place. Fuller v. Dame, 18 Pick., 472; Pacific R. R. Co. v. Seely, 45 Mo., 212. A combination for street improvement, agreeing to pay some who will come into the scheme. Maguire v. Smock, 42 Ind., 1; Howard v. First Ind. Church, 18 Med., 451. A contract that a right be waived, which is in contravention of State policy. Branch v. Tomlinson, 77 N. C., 388. Contracts in restraint of marriage. Lowe v. Peers, 4 Burr, 2225; Baker v. White, 2 Vern., 215; Woodhouse v. Shepley, 2 Atk., 535; Cook v. Richards, 10 Ves., 429; Phillips v. Medbury, 7 Conn., 567; Conrad v. Willlams, 6 Hill, 444; England v. Downes, 1 Beav., 96; Rarltey v. Rice, 10 East, 22; Sterling v. Sinnickson, 2 South, 750; Eldred v. Malroy, 2 Col. (Ter.), 320; Young, ex parte, 6 Biss., 53. A marriage brokerage contract. Roberts v. Roberts, 3 P. Wms., 74; Drury v. Hooke, 1 Vern., 412; Smith v. Aykwell, 3 Atk., 566; Boynton v. Hubbard, 7 Mass., 112. A contract for the purchase of land belonging to the United States, in fraud of the laws of the same. Brake v. Ballou, 19 Kan., 397; Smith v. Johnson, 37 Ala., 633. The contracts of a public enemy; no one can enforce them for his benefit. Brandon v. Nesbitt, 6 Term. Rep., 23; Albritcht v. Sussman, 2 V. & B., 323; Musson v. Fales, 16 Mass., 334. A contract cannot be enforced which is in restraint of trade or business. Alger v. Thatcher, 19 Pick., 51. Where the contract is void as against public policy, and has been executed, the law will not restore the price paid, nor will it redeliver property. Letter v. Alvey, 15 Kan., 159; Marksburg v. Taylor, 10 Bush., 519. Contracts not to bid against each other at a public auction, particularly where property is sold on execution. Puffers, or underbidders, who mislead other bidders. Jones v. Caswell, 3 Johns. Cas., 29; Dollin v. Ward, 6 Johns., 194; Wilbur v. How, 8 id., 444; Bartle v. Coleman, 4 Pet., 184; Craig v. State of Missouri, id., 436.

advantage of, contrary to the real justice between him and the plaintiff—by accident, if I may so say."(*h*) Where the defendant has received the benefit of the contract, this defense is evidently an unrighteous one, and will accordingly be received by the court with some degree of disfavor.(*i*)

§ **460**. The principle on which this defense reposes is shown by the cases on the specific performance of awards; for the illegality of the act directed to be done by the award will be a ground for refusing specific performance, although the unreasonableness of the act would be no ground, it being a decision by the judge chosen by the parties.(*j*) It is further illustrated by this, that where, in a suit for specific performance, a fact not put in issue by either party has come out on the evidence affecting the legality of the contract, it has been noticed by the court, which has not proceeded without directing an inquiry.(*k*)

§ **461**. As to the clearness of the illegality which will be a bar to specific performance, there is perhaps some slight diversity of expression. In Johnson v. Shrewsbury and Birmingham Railway Co.,(*l*) Knight Bruce, L. J., laid it down that, before the court would enforce the specific performance of a contract, it must be satisfied that there is not a reasonable ground for contending that the contract is illegal or against the policy of the law: and in another case,(*m*) Turner, L. J., refused to enforce a contract for sale which he held to have been entered into for the purpose of acquiring the right to set aside a transaction for fraud committed on the vendor to the plaintiff: he declined to determine whether the contract was tainted with champerty or maintenance; but held that the right to complain of fraud was not a marketable commodity. But in a case on a contract by a solicitor retiring from a firm, to allow his name to be used after his retirement, Lord Hatherley (then Wood, V. C.) observed, "the agreement must be legal or illegal, and it is not within the discretion of the court to refuse specific performance, because an agreement savors of illegality. It must be shown to be illegal."(*n*)

(*h*) In Holman v. Johnson, Cowp., 343.
(*i*) Shrewsbury and Birmingham Railway Co. v. London and North-Western Railway Co., 16 Beav., 44. See, also, supra, § 318, and cf. Williams v. The St. George's Harbor Co., 2 De G. & J., 547, 558.
(*j*) Wood v. Griffith, 1 Sw., 43.
(*k*) Parken v. Whitby, T. & R., 366; Evans v. Richardson, 3 Mer., 469.
(*l*) 3 De G. M. & G., 914. See, also, City of London v. Nash, 3 Atk., 512; S. C., 1 Ves. Sen., 12.
(*m*) De Hoghton v. Money, L. R. 2 Ch., 164.
(*n*) Aubin v. Holt, 2 K. & J., 70.

§ **462**. Where a trust is constituted, designed to give effect to a contract in itself incapable of being enforced, and the trust is in itself perfectly lawful and independent of the contract, except so far as that may be necessary to explain the constitution of the trust, there the trust may be enforced, and by means of it the contract incidently performed. This principle was acted on in the case of Powell v. Knowler,(*o*) before Fortescue, M. R., where A. and B. entered into a contract for the division of an estate to be recovered, which was incapable of being enforced on the ground of champerty, and the party who, according to the contract, was to convey part of the estate to the other, by a codicil directed the contract to be carried into execution, and created a trust for that purpose; the trust was specifically enforced against the trustee.

§ **463**. The principle of this case is in analogy with that of several other cases. Thus where an act, though the result of an unlawful contract, is itself lawful, it may form the consideration for a lawful contract, as, for instance, the actual transfer of stock, the contract for which was illegal.(*p*) Similarly a trustee into whose hands money is paid on account of a third person cannot set up the illegality of the trust under which the money was so paid, though the *cestui que trust* could not have enforced his right against the payer directly, as in that case he could only have got at the money through the illegal contract.(*q*)

§ **464**. The position of the court with regard to illegal contracts was thus stated by Jessel, M. R., in a recent case.(*r*) "I think," said his lordship, "the principle is clear that you cannot directly enforce an illegal contract, and you cannot ask the court to assist you in carrying it out. You cannot enforce it indirectly; that is, by claiming damages or compensation for the breach of it, or contribution from the persons making the profits realized from it. It does not follow that you cannot, in some cases, recover money paid over to third persons in pursuance of the contract; and it does not follow that you cannot, in other cases, obtain, even from the parties to the contract, moneys which they have become possessed of by representations

(*o*) 2 Atk., 224.
(*p*) M'Callan v. Mortimer, 9 M. & W., 636.
(*q*) Thomson v. Thomson, 7 Ves., 470; Tennant v. Elliott, 1 B. & P., 3.
(*r*) Sykes v. Beadon, 11 Ch. D., 170.

that the contract was legal, and which belonged to the persons who seek to recover them."(*s*)

§ 165. Trade unions being, apart from the trade union act, 1871, illegal associations, the court will not, at the instance of a member of such an union, enforce a contract contained in its rules for providing benefits for its members.(*t*)[1]

(*s*) 11 Ch. D., 197. (*t*) Rigby v. Connol, 14 Ch. D., 482; cf. Duke v. Littleboy, 28 W. R., 977.

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[1] *Where the consideration is immoral.*] Such contracts are never enforced at law or in equity. An agreement for the commission of crime, or in violation of a statute law, or the writing, printing or sale of an immoral or libelous book or picture. Trovinger v. McBurney, 5 Cow., 253; Fores v. Johns., 4 Esp., 97; Poplet v. Stockdale, R. & M., 337.

Contract forbidden by statute law.] It is hardly necessary to say that such agreements are always void. Tucker v. West, 29 Ark., 386.

Prohibitory words in statute.] The rule is now well-settled, that although there are no prohibitory words in statute, that a penalty imparts a prohibition. Bartlett v. Vinor, Carth., 252; Little v. Poole, 9 B. & C., 192; Cannan v. Bryce, 3 B. & Ald., 179; De Begnis v. Armistead, 10 Bing., 107; Foster v. Taylor, 5 B. & Ald., 896; Ferguson v. Norman, 6 Scott, 794; Mitchell v. Smith, 4 Dall., 269; Pray v. Burbank, 10 N. H., 377; Sharp v. Lease, 4 Halst., 352; Seidenhender v. Charles, 4 Serg. & Rawle, 159; Harris v. Runnels, 12 How., 80; Coombs v. Emery, 14 Me., 404; Terrett v. Bartlett, 21 Vt., 184; White v. Bass, 3 Cush., 449.

Usury affecting the contract.] Such contracts cannot be enforced specifically. Belcher v. Vardon, 2 Col., 173. A plaintiff seeking the aid of a court of equity from a contract usurious in its nature, must expect relief only upon the terms of paying what is, in fact, due to the defendant. Where he does not offer to do so, the pleadings may be demurred to. Story's Eq. Jur., § 301; Burfield v. Solomons, 9 Ves., 84; Rogers v. Rathbun, 1 John.'s Ch., 367; Ballenger v. Edwards, 4 Ired. Eq., 449; Beard v. Bingham, 76 N. C., 285.

Wagering contracts.] A wager is "a contract in which the parties stipulate that they shall gain or lose upon the happening of an uncertain event in which they have no interest, except that arising from the possibility of such gain or loss." Farcira v. Gobell, 89 Pa. St., 90. Such contracts were lawful at common law. Chitty on Con., 615. An action will be sustained, brought to compel a gambling security to be given up to be canceled. Rawden v. Shadwell, Ambler, 269; Hasket v. Wotman, 1 Nott. & McCord, 180; Wood v. Wood, 2 Murphy, 172; Forrest v. Hunt, id., 458; Martin v. Terrell, 12 Sm. & Marsh, 571; *contra*, Cowles v. Raquet, 14 Ohio, 55. The entire contract is void, where a part of the consideration of the same was lost and won at gambling. Reed v. Reeve, 13 Bush. (Ky.), 447.

Frustrating the administration of justice.] No contract which has this for its object, can ever be enforced; that evidence shall be withheld and the like. Kimbrough v. Lane, 11 Bush. (Ky.), 550. A contract was made with a party to pay him, he being a witness in a cause on trial, provided his evidence should lead to a favorable result for the party calling him. Held, that such contract was void. Pollock v. Gregory, 9 Bosw., 116; Nickleson v. Wilson, 6 N. Y., 362; reversing S. C., 1 Hun., 615, is an instructive case on this point.

Compounding a felony] Where a contract is sought to be avoided on the ground that the consideration was the compounding a felony, it must be shown that the compounding the felony was the consideration for the contract in question. The consideration of an instrument was *bona fide*, and the debtor was under an obligation to pay or secure the same. Held, that a threat of a criminal prosecution, unless a mortgage is given, does not compound the offense. Plant v. Gunn, 2 Woods., 372.

Contract for goods purchased for an illegal purpose.] Where an action is brought to recover the price of goods sold, the vendor knowing that they were purchased for an illegal purpose—Held, that it was no defense, provided it was not made a part of the contract that they should be used for that purpose; and also provided, that nothing has been done by the vendor in furtherance of the unlawful design. Holman v. Johnson, Cowp., 341; Faikney v. Reynous, 4 Burr, 2069; Hodgson v. Temple, 5 Taunt., 181; Merchants' Bank v. Spalding, 12 Barb., 302; Armstroug v. Toller, 11 Wheat., 258; Tracy v. Talmage, 14 N. Y., 162; McKinny v. Andrews, 41 Texas, 363; *contra*, Langdon v. Hughes, 1 Maule & Seld., 593. Walworth, Ch., in De Groot v. Vanduzer, 20 Wend., 390, gives a very clear exposition of the law on this question: "There are, undoubtedly many conflicting decisions upon the question, how far the vendor of an article is chargeable with a participation in the illegal purpose for which it is intended to be used, from a mere knowledge of the fact that the purchaser intends so to use it. The case of the druggist who sold drugs to a brewer, knowing that he intended to use them in brewing, contrary to the statute, is a very strong case in favor of extending the principle to a collateral contract, which had no necessary connection with the violation of the law. That case shows, too, that where the agreement is made for the purpose of aiding the violation of the law, it is not necessary to aver and prove that the offense was, in fact, consumated by an actual violation subsequent to the agreement, which agreement is void from the beginning. Langton v. Hughes, 1 Maule & Seld., 593. If a trader agrees to furnish a robber with arms and ammunition for the purpose of carrying on his business of highwayman, it cannot be a valid answer to the illegality of the contract, that the arms and ammunition sold to him for that purpose were not, in fact, used in the prosecution of the illegal object originally intended at the time of the purchase. The illegality of the contract consists in the intention to aid in a violation of the law, or of a principle of public policy, or to commit a breach of good morals, and not in the actual consummation of the offense. These cases in which an independent contract has been held void from a mere knowledge of the fact of the illegal end in view, proceed on the ground that the party having such knowledge, intended to aid the illegal object at the time he made the contract; and whenever, therefore, that intention is shown, no doubt can exist as to the propriety of applying the rule that no action or claim can be sustained in a court of justice founded upon such contract."

Contracts in cases where the parties sustain fiduciary relations to each other.] Such contracts are those between attorney and client, guardian and ward, parent and child, physician and patient, principal and agent, and trustee and *cestui que trust.* Such agreements are rarely enforced, and are regarded with suspicion. Goddard v. Carlisle, 9 Price, 169; Fox v. McKrath, 2 Bro. C. C., 407; Baker v. Bradley, 35 Eng. Law & Eq., 449; Wolmesley v. Booth, 2 Atk., 25; Edwards v. Myrick, 2 Hare, 60; Billing v. Southee, 10 Eng. Law & Eq., 37; Dent v. Bennett, 4 M. & C., 269; Dawson v. Massey, 1 B. & B., 226; Hylton v. Hylton, 2 Ves., 548; Hatch v. Hatch, 9 id., 292; Cecil v. Plaistour, 1 Aust., 202; Taylor v. Taylor, 8 How , 200; Jenkins v. Pye, 12 Pet., 241; Socum v. Marshall, 2 Wash. C. C., 397; Whalen v. Whalen, 3 Cow., 537; Bonney v. Hollingsworth, 23 Ala , 698; Sears v. Shafer, 2 Seld., 268; Hewett v. Crane, 2 Halst. Ch., 159; Howell v. Ransom, 11 Paige's Ch., 538; Evans v. Ellis, 5 Denio, 640; Voorhees v. Presbyterian Church, 8 Barb., 136; Blackmore v. Shelly, 8 Humph., 439; Dobson v. Racey, 3 Sandf., 61; Pratt v. Thornton, 28 Me., 335; Van Epps v. Van Epps, 9 Paige's Ch., 207; Farnam v. Brooks, 9 Pick., 212; King v. Baldwin, 2 John. Ch., 554; Bank of N. S. v. Etting, 11 Wheat., 59; Kerr on Fraud, 161, 162.

Equity of redemption.] Contracts between mortgagor and mortgagee, which have for their object the extinguishment of the equity of redemption, are viewed with great suspicion by the courts; yet a new contract made between them, whereby the title becomes absolute, if it is fair, will not be disturbed. Remsen v. Hoy, 2 Edw. Ch., 535; Wilson v. Carpenter, 62 Ind., 495.

CHAPTER X.

OF THE CONTRACT BEING ULTRA VIRES.

§ **466**. Corporations created for special purposes have a power to contract, but within certain limits only, and all contracts in excess of their powers, or *ultra vires*, are void, and, therefore, necessarily incapable of being enforced in any legal proceeding. This subject has of late years undergone great discussion in respect of contracts by railway and other companies.[1]

§ **467**. A contract entered into by such a corporation in the proper form is *prima facie* good, and the *onus* lies on

[1] In Barry v. Merchants' Exchange Company, 1 Sandf. Ch., 280, it is decided that every corporation has, as such, at common law, the capacity to take and grant property, and to contract obligations in the same manner as an individual; that, except when restrained by law, it has the absolute *jus disponendi* of its property, whether of lands or chattels, and in its exercise is unlimited as to objects and quantity; and when created for limited and specific purposes, by the nature of which its common-law powers are restricted, it may make all contracts necessary and usual in the course of its business, as means to effect its objects; and within these limits, unless especially prohibited by law, or the provisions of its charter, may deal precisely as an individual might, who sought to accomplish the same ends. The powers of a corporation are to be ascertained by a reference to the acts of the legislature concerning it; and a corporation can have no powers not specially granted to it, or such as are incidental or necessary to give effect to those specially granted. State v. Mayor of Mobile, 5 Porter, 279. And there is no rule more plainly established than that these powers must not be exceeded. Binney's Case, 2 Bland, 99. Therefore a corporation constructing works beyond that which is necessary for the purposes of their incorporation, and beyond what is contemplated by their charter, will be restrained, by injunction, from continuing their erections beyond the limits allowed. Newark Plank-road Co. v. Elmer, 1 Stock. (N. J.), 754. Smith v. Morse, 2 Cal., 524, is an analogous case with Newark Plank-road Co. v. Elmer, and Binney's case. A very forcible instance of the rigidity of the doctrine is presented in the case of Russell v. Topping, 5 McLean, 194. In this case, A. mortgaged several tracts of land to the plaintiff in ejectment, and afterwards mortgaged one of the tracts to an incorporated bank. The plaintiff foreclosed his mortgage in chancery, making the bank a party defendant. The bank answered that A. had mortgaged to them, subsequently to the plaintiff's mortgage, several parcels of land, but not the lot in dispute; that he was largely indebted to them, and was then insolvent, and prayed that the lands not included in their mortgage should first be sold to pay plaintiff's debt, and that the lands included in their mortgage should be sold only in the event of the other lands not being sufficient to pay the plaintiff's debt. Decree accordingly. At the sale the bank purchased the lot in question and took a conveyance. The defendant claimed through the bank. The plaintiff received the purchase money paid by the bank, and A. being otherwise indebted to him, the plaintiff brought suit against him, recovered judgment, levied execution on the land in

the person alleging it to be void to show that it is in excess of the corporation's powers, and not on the person relying on it to show that the corporation was authorized to enter

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controversy, and became the purchaser. By its charter the bank was prohibited from purchasing, holding and conveying real estate, except such as was required for the transaction of its business, or such as had been mortgaged as security for previous loans, or such as had been conveyed to it in satisfaction of debts previously contracted in the course of its dealings, or such as had been purchased at sales upon judgments, mortgages or decrees, obtained or made for such debts. Held, that the bank was not competent to acquire any title to the lot in question at the sale; and that the plaintiff was entitled to contest the validity of the sale to the bank, notwithstanding he had received the purchase money. In the case of the Mechanics' and Savings Bank v. Meriden Agency, 24 Conn., 159, a joint-stock company organized, as expressed in their articles of association, "to do a general insurance agency, commission and brokerage business, and such other things as are incidental to, and necessary in, the management of that business," was held to have no power to subscribe to the stock of a savings bank and building association. Neither has an insurance company any authority to subscribe to the stock of a mutual insurance company, and agree to give its notes in advance for premiums on insurance subsequently to be effected. Berry v. Yates, 24 Barb., 199. Nor is a plank road company authorized to loan money, unless there is a special clause in the charter to that effect. Madison, etc., Plankroad Co. v. Watertown, etc., Plankroad Co., 5 Wis., 173. .It must not be understood, however, that corporations have no other powers than those strictly conferred by charter. As has already been said, an act of incorporation carries with it all the powers necessary to accomplish the act, unless it impairs vested rights. Morris and Essex R. R. v. Newark, 2 Stockt (N. J.), 352; Strauss v. Eagle Insurance Co., 5 Ohio, 59. The rule is, that if the means employed are reasonably adapted to the ends for which the corporation was created, they come within its implied or incidental powers, though they may not be specifically designed by the act of incorporation. Madison, etc., Plankroad Co. v. Watertown, etc., Plankroad Co., 5 Wis., 173. So, a corporation has, as incidental, a right to make an agreement with an agent to compensate him for obtaining subscriptions to the stock. Cincinnati, Indianapolis and Chicago R. R. Co. v. Clarkson, 7 Ind., 595. Another incidental power is that of the corporation to create debts. Barry v. Merchants' Exchange Co., 1 Sandf. Ch., 280. But where the charter makes peculiar specifications, as, for example, of modes of investing the corporate funds, all other modes of investment are precluded. Scott v. De Peyster, 1 Edw. Ch., 513.

The rights of strangers dealing with corporations may vary, according as the act is *ultra vires* in one or the other of these senses. When an act is *ultra vires* in the first sense mentioned, it is generally, if not always, void *in toto*, and the corporation may avail itself of the plea. But when it is *ultra vires* in the second sense, the right of the corporation to avail itself of the plea will depend upon the circumstances of the case. In the former case, the defense of *ultra vires* is available to the corporation as against all persons, because they are bound to know, from the law, of its existence, that it has no power to perform the act. But in the latter case, the defense may or may not be available, depending upon the question whether the party dealing with the corporation is aware of the intention to perform the act for an unauthorized purpose, or under circumstances not justifying its performance. And the test as between strangers having no knowledge of an unlawful purpose and the corporation, is to compare the terms of the contract with the provisions of the law from which the corporation derives its powers; and if the court can see that the act to be performed is necessary beyond the powers of the corporation for any purpose, the contract cannot be enforced, otherwise it can." Miners' Ditch Co. v. Zellenback, 37 Cal , 543; Whitney Arms Co. v. Barlow, 63 N. Y., 62; Pennsylvania Nav. Co. v. Dandridge, 8 Gill. & John., 248; South Yorkshire Co. v. Great Northern R. R. Co., 9 Exch., 55, 84; Mayor of Norwich v. Norwich and Norfolk R. R. Co., 4 Ell. & Bl., 397.

into it. Corporations have by law a power to enter into all contracts not expressly or impliedly prohibited;(*a*) and, therefore, all corporate bodies are *prima facie* bound by contracts under their corporate seals; "but this *prima facie* right," said Lord Cranworth, "does not exist in any case where the contract is one which, from the nature and object of incorporation, the corporate body is expressly or impliedly prohibited from making."(*b*) "Where a corporation," said Lord Wensleydale,(*c*) "is created by an act of parliament for particular purposes, with special powers, their deed, though under their corporate seal, and that regularly affixed, does not bind them, if it appears by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed is *ultra vires;* that is, that the legislature meant that such a deed should not be made."

§ **468**. This doctrine was very fully discussed in a case to which it is proposed now briefly to advert. In the case of The Shrewsbury and Birmingham Railway Co. v. The London and North-Western Railway Co.,(*d*) the contract between the companies was briefly to the effect that the North-Western Company should give up to the Shrewsbury Company seven-thirteenths of the profits of the carriage of passengers and goods over a part of the North-Western line, in consideration of receiving, in return, six-thirteenths of the profits made by the Shrewsbury Company on a certain portion of their line. In the course of the protracted litigation which arose out of this contract, opposing opinions were given by the highest authorities as to whether it was *ultra vires* or not, Lord Cottenham and the Queen's Bench inclining to the opinion of its validity, and Turner, L. J., and Lord Cranworth sitting in the House of Lords leaning strongly to the opinion that it was in excess of the powers of the companies. If such a contract was valid as to part of the line, why should it not be valid as to the whole? and if

(*a*) Per Erle, J., in Mayor of Norwich v. Norfolk Railway Co., 4 El. & Bl., 397, 413.

(*b*) In Directors, etc., of The Shrewsbury and Birmingham Railway Co. v. Directors, etc., of The North-Western Railway Co., 6 H. L. C., 135-6.

(*c*) In South Yorkshire Railway and River Dun Co. v. Great Northern Railway Co., 9 Exch., 84: accordingly Bateman v. Mayor, etc., of Ashton under Lyne, 3 H. & N., 323.

(*d*) Before Lord Cottenham, 2 Mac. & G., 324; before Lord Truro, 3 id., 70; before Q. B., 17 Q. B., 652; before Lord Romilly, M. R., 16 Beav., 441; before the Court of Appeal in Chancery, 4 De G. M. & G., 115; and in D. P., 6 H. L. C., 113; and see Lancaster and Carlisle Railway Co. v. North-Western Railway Co., 2 K. & J., 293; Hare v. London and North-Western Railway Co., 2 J. & H., 80; Midland Railway Co. v. Great Western Railway Co., 21 W. R., 657.

so, there would be no impediment, it was urged, to two companies bringing their funds into a common stock, and dividing them amongst their shareholders in any stipulated proportion.

§ **469**. It would be foreign to the objects of this treatise to discuss the very numerous cases which have arisen on this doctrine of *ultra vires*, involving, as they almost always do, a careful consideration of the statutes in force with regard to the class of corporations in question, the charter or act of parliament or memorandum of association of the particular corporation and the contract in question in each case.(*e*)

§ **470**. The question of *ultra vires* as applicable to corporations must be carefully distinguished from the question of *ultra vires* as applicable to the agents or officers of those bodies. An act which is beyond the powers of the corporation can never be good and can never be made good by ratification or acquiescence or in any way short of act of parliament.(*f*) On the other hand, an act which is within the powers of the body, but beyond the powers of the board of directors or other managers, may, and often does, become binding on the corporation by its ratification or acquiescence; and so, again, acts which are beyond the powers of the managers, except on the observance of certain conditions, may, if within the powers of the body corporate, be held good by a judicial inference from the conduct of the corporation that the conditions have been observed. The first class of acts are void from the nature of the corporation; the second are objected to as having been beyond the scope of the agent's authority.[1]

(*e*) See Brice's Doctrine of Ultra Vires. (*f*) See Ashbury Railway Carriage and Iron Co. v. Riche, L. R. 7 H. L., 653.

[1] *Distinction between corporations and individuals.*] The former can exercise no powers which are not conferred by their charters, while the latter may make any contract which the law sanctions. Head v. Providence Ins. Co., 2 Cranch, 127; Bank of N. S. v. Danbridge, 12 Wheat., 64; Hannable and St. Joseph R. R. Co. v. Marion, 36 Mo., 294; Mathews v. Spinner, 62 id., 329; National Bank v. Taylor, 56 Pa. St., 15.

Scope of corporations.] The charter of a corporation, with reference to its powers and capacities, must, like any other statute, be construed as an entirety. White's Bank v. Toledo Ins. Co., 12 Ohio St., 601; Toledo v. North American Coal Co., 3 Head (Tenn.), 337. The general purpose for which the corporation was formed must be considered, and such reasonable construction be given to the terms employed, as will tend to bring about such purpose. Vandall v. South San Francisco Dock Co., 40 Cal., 83. A corporation possesses all such

§ 171. Hence it must not be assumed that the question of *ultra vires* is in all respects the same when it arises between the members of a company and its directors, and when it arises between the company and a third person.

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powers as are necessarily incident to those specifically granted, or are essential to the purposes and objects for which the corporation was organized. It is not limited to the powers specifically granted. Bank of Augusta v. Earl, 13 Pet., 519; Whitman Mining Co. v. Baker, 3 Nev., 386; Coleman v. Eastern Counties R. R. Co., 10 Beav., 17; Ketchum v. City of Buffalo, 14 N. Y., 356; Le Couteulx v. City of Buffalo, 33 id., 333; Shammut Bank v. Plattsburgh R. R. Co., 31 Vt., 491.

Municipal corporations.] Such corporations are held more strictly to their charters than others. Parties dealing with them are bound to know their powers at their peril. City of Leavenworth v. Rankin, 2 Kan., 357; Thomas v. City of Richmond, 12 Wall., 349.

Different security from that prescribed.] The charter of a corporation prescribed what species of security should be taken of its officers. Held, that if a different sort was taken, it could be enforced against the party who gave it. Bank of South Carolina v. Hammond, 1 Rich., 281; Mott v. United States Trust Co., 19 Barb., 568; United States Trust Co. v. Brady, 20 id., 119; Littlewort v. Davis, 50 Miss., 403; see, however, Spendon v. Mayor, etc., of New York, 7 Bosw., 601; S. C., 21 How. Pr., 395.

Corporation may waive its rights.] In a case where the provisions of a corporation's charter were designed to protect it, it was held that such provisions might be waived, and that such waiver might be shown by a repetition of acts of a like or similar character. Hood v. N. Y. and N. H. R. R. Co., 22 Conn., 502.

Legality of corporate act presumed.] "The dealings of a corporation which on their face, or according to their apparent import, are within its charter, are not to be regarded as illegal or unauthorized, without some evidence tending to show that they are of such a character. In the absence of proof, there is no legal presumption that the law has been violated. On the contrary, these artificial bodies, like natural persons, are entitled to the benefit of the rule which imputes innocence, rather than wrong, to the conduct of men. A different doctrine would require a corporation, even in many of its ordinary transactions, to show that it had not transcended the limits of its charter." Chautauqua County Bank v. Risley, 19 N. Y., 369; Farmers' Loan and Trust Co. v. Clowes, 3 id., 470; De Graff v. American, etc., Co., 21 id., 124; Yates v. De Bogert, 56 id., 526; Farmers' Loan and Trust Co. v. Perry, 3 Sandf. Ch., 339; Peru Iron Co., ex parte, 7 Cow., 540; Safford v. Wyckoff, 4 Hill, 442; Morris and Essex R. R. Co. v. Sussex R. R. Co., 20 N. J. Eq., 542; Charleston Turnpike Co. v. Willey, 16 Ind., 34; Dana v. Bank of St. Paul, 4 Minn., 385; Mitchell v. Rome R. R. Co., 17 Ga., 574; Oxford Iron Co. v. Spradley, 46 Ala., 98.

Definition of incidental power.] "An incidental power is one which is directly and immediately appropriate to the execution of the power granted, and not one which has a slight or remote relation to it." Hood v. New York and New Haven R. R. Co., 22 Conn., 1; People v. Utica Ins. Co., 15 John., 358; New York Firemen's Ins. Co. v. Sturges, 2 Cow., 664; Same v. Ely, id., 678; Broughton v. Manchester Water Works, 3 Barn. & Ald., 9; People v. Trustees of Geneva College, 5 Wend., 217; Trustees v. Peasley, 15 N. H., 317; Downing v. Mt. Washington R. R. Co., 40 id., 230; Fuller v. Trustees of Plainfield School, 6 Conn., 532; Commonwealth v. Erie R. R. Co., 27 Pa. St., 339; Dartmouth College v. Woodward, 4 Wheat., 518; Pacific R. R. Co. v. Sealy, 45 Mo., 212; Town of Petersburgh v. Metzker, 21 Ill., 205; see, however, Hart v. Rensselaer and Saratoga R. R. Co., 8 N. Y., 37; Quimby v. Vanderbilt, 17 id., 306; Bissell v. Michigan Southern R. R. Co., 22 id., 258; Buffet v. Troy and Boston R. R. Co., 40 id., 168. Unless the powers claimed to be implied are immediately and directly appropriated to the execution of the specific powers, and the same are a careful and necessary means to give them effect,

§ **472**. Some contracts are of such a nature that every one must know them to be beyond the powers of the corporation with which he is dealing, as *e. g.*, a contract by a railway company to buy a thousand gross of green specta-

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such implied powers will not be held to be within the scope of the charter. Curtiss v. Leavitt, 13 N. Y., 157, 158.

Unauthorized act by corporation.] Such an act is void, and cannot be enforced either at law or equity. Mutual Life and Fire Ins. Co. v. McKelway, 1 Beasley's Ch., 133; Pennsylvania Co. v. Danbridge, 8 Gill. & John., 248; Pearce v. Madison R. R. Co., 21 How., 441; Haynes v. Corrington, 13 Sm. & Marsh., 411; Little v. O'Brien, 9 Mass., 423; Commercial Bank v. Nolan, 7 How. (Miss.), 508; Littlewort v. Davis, 50 Miss., 403; Matter of Brooklyn R. R. Co., 72 N. Y., 245; Bank of Michigan v. Niles, 1 Doug., 401; aff'g S. C., 1 Walker (Mich.), 99; Brown v. Winnismap Co., 11 Allen, 326.

Corporate acts impliedly prohibited.] Any intentional use by a corporation of any of its powers, with the intention of defeating the objects for which it was created, will be prohibited by implication. East Anglican R. R. Co. v. Eastern Counties R. R. Co., 11 C. B., 775; S. C., 7 Rail. Cas, 150; McGregor v. Dover and Deal R. R. Co., 18 Q. B., 618; S. C., 7 Rail. Cas., 227; Gage v. Newmarket R. R. Co., 18 Q. B., 457; Eastern Counties R. R. Co. v. Hawkes, 5 House of Lds., 347; South Yorkshire R. R. Co. v. Great Northern R. R. Co., 9 Ex., 55, 643; Patchin v. Doolittle, 3 Vt., 457; Common v. Inhabitants of Cambridge, 7 Mass., 158; Parks v. Boston, 8 Pick., 218; Dudley v. Cilley, 5 N. H., 558; Goodwin v. Milton, id., 458; Third Turnpike Co. v. Champnay, 2 id., 199; Knowle's Petition, 22 id., 361; Dudley v. Butler, 10 id., 281; Guernsey v. Edwards, 26 id, 224; Springfield v. Harris, 107 Mass., 532; Townsend v. Hoyle, 20 Conn., 1.

Private party contracting with corporation.] A contract may be *ultra vires* with respect to the officers or stockholders of a corporation, and not so in relation to a private party. Mount v. Shrewsbury R. R. Co., 13 Beav., 1; Cohen v. Wilkinson, 5 Rail. Cas., 741; Beaman v. Raffard, 7 id., 48, 75; Simpson v. Dennison, 10 Hare, 51. To effect a private party, he must have known, at the time of entering into the agreement, that it was intended for a purpose foreign to the incorporation of the company. Osipee Manuf'g Co. v. Canney, 54 N. H., 295.

Act entirely complete on plaintiff's part] It is a well-settled rule that the defense of *ultra vires* cannot be pleaded by a corporation, in a case where the contract has been fully postponed, and the corporation has had the advantage of the performance. Parish v. Wheeler, 22 N. Y., 494; Silver Lake Bank v. North, 4 Johns. Ch., 370; Palmer v. Lawrence, 3 Sandf., 161; State of Ind. v. Woram, 6 Hill, 37; Chester Glass Co. v. Dewey, 16 Mass., 94; Steamboat Co. v. McCutchen, 13 Pa. St., 13; Steam Nav. Co. v. Weed, 17 Barb., 378; Whitney Arms Co. v. Barlow, 63 N. Y., 62; Chippendale, ex parte, 4 De G. M. & G., 19; In re National Soc., L. R., 5 Ch., 309; In re Corle, etc., R. C., 4 id., 748; Fishmongers Co. v. Robertson, 5 Me. & G., 131; Allegheny City v. McClurkson, 14 Pa. St., 81; Bradley v. Ballard, 55 Ill., 413; Rock River Bank v. Sherwood, 10 Wis., 230; Farmers' Bank v. Detroit R. R. Co., 27 Wis., 372.

Repayment can be compelled.] Where a contract made with a corporation is void, and for that reason the party cannot maintain an action upon it, he may recover what has been paid, when the parties are not *in pari delicto*. Robinson v. Bland, 2 Burr., 1077; Howson v. Hancock, 8 Term. R., 577; Utica Ins. Co. v. Scott, 19 John., 1; Same v. Cadwell, 3 Wend., 296; Same v. Bloodgood, 4 id., 652; Little v. O'Brien, 9 Mass., 423; Episcopal Soc. v. Episcopal Church, 1 Pick., 372; White v. Franklin Bank, 22 id., 181; Rich v. Errol, 51 N. H., 361; Whitney v. Peay, 24 Ark., 22. Where money has been paid in advance to a corporation, upon a contract which is *ultra vires*—Held, that the party so paying might recover the same, and that he need make no previous demand. Dill v. Wareham, 7 Metc., 438.

Surrender of possession before action brought.] "The cases in which possession must be surrendered before an action for the purchase money can be

cles, or a contract by a company formed to make a railway from A. to B. for the construction of a railway from C. to D. Such contracts as these are equally void, whether the question arise between the company and a stranger or between members of the corporation. But the case is quite different as regards many other contracts which may or may not be really entered into for the purposes of the company. Directors might buy iron rails not really for the purposes of the line but for speculation. This contract would be void as against the shareholders, but might be perfectly good in favor of the vendor to the company. In short, the mere fact that a contract by the directors is *ultra vires*, as between them and the shareholders, does not necessarily disentitle the other party to the contract from suing upon it. To do so, it is further necessary that the party suing should have known at the time of the contract that it was intended for a purpose unconnected with the incorporation of the company. The nature of the contract will show this in some cases: in others it will not.(*g*)

§ 473. From this principle it follows that, where a public company is authorized to take land for extraordinary purposes, a person who agrees to sell his land to this company is not bound to see that it is strictly required for such purposes; but if he acts *bona fide* and without knowledge that the land is not so required, or that the transaction is any misapplication of the funds of the company, the contract is binding in his favor, and may be enforced by him in equity;(*h*) and the same holds goods where the company, really requiring part of an estate, purchase more than is required.(*i*)[1]

(*g*) Per Lord Campbell, C. J., and Erle, J., in Mayor of Norwich v. Norfolk Railway Co., 4 El. & Bl., 397, 415, 443; per Lords Campbell and St. Leonards in Eastern Counties Railway Co. v. Hawkes, 5 H. L. C., 338, 355, 372; Re Contract Corporation, L. R. 8 Eq., 14; Green v. Nixon, 23 Beav., 530; Royal British Bank v. Turquand, 5 El. & Bl., 248; 6 id., 327.

(*h*) Eastern Counties R'way Co. v. Hawkes, 5 H. L. C., 331, 349, 355.

(*i*) S. C.

brought, are those where a contract has been made, and possession has been taken thereunder, and the vendee seeks to rescind the contract on the ground of defective title, or the inability of the vendor to perform the contract on his part, or of some fraudulent representations inducing its execution. In these cases the vendee must offer to restore whatever he has received before he can call upon the vendor to refund the purchase money. Where the contract is void, there is nothing to rescind; no rights are acquired, and there are, in consequence, no rights to restore." McCracken v. City of San Francisco, 16 Cal., 591.

[1] In the case of the Southern Life Insurance and Trust Co. v. Lanier, 5 Fla., 110, a contract with a corporation was held to be binding on the parties, although it was an abuse of the corporate powers, for which the corporation was answerable to the government who created it.

§ 474. Furthermore, a contract will not be void as against a third person dealing *bona fide* with the corporation, because there may have been the omission to observe some formality required by the terms of its constitution, or because there may have been some irregularity on the part of the directors or officers of the body entering into it on their behalf. Thus, for instance, it has been held to be no defense to an action against a company upon a debenture sealed with their common seal that the borrowing of the money thereby secured was not sanctioned by the resolution of an extraordinary general meeting as required by its deed of settlement.(*j*)[1]

(*j*) Royal British Bank v. Turquand, 5 El. & Bl., 248; 6 id., 327; Agar v. Athenæum Life Assurance Society, 3 C. B. N. S., 725; Grady's Case, 1 De G. J. & S., 488; Prince of Wales Assurance Co. v. Harding, El. B. & E., 183.

[1] The case of Kean v. Johnson, 1 Stockt. (N. J.), proceeds upon this same principle. There, an incorporated company were engaged in a prosperous undertaking. The majority of stockholders and board of directors wished to sell out, and invest the capital in other enterprises, and the minority came for relief to the court of chancery. It was held, that in cases of joint-stock companies there was a contract between all the stockholders and the board of directors, that the joint funds should be used for certain specified purposes, and that any material deviation was a breach of this contract which would not be permitted.

CHAPTER XI.

OF THE STATUTE OF FRAUDS AND THEREIN OF PART PERFORMANCE.

§ **475**. By the fourth section of the Statute of Frauds(*a*) it is, amongst other things, enacted that no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

§ **476**. This section affects not the contract itself, but the right of either party to sue the other upon it. Hence it has been decided that it refers not to the solemnities of the contract, but to the procedure, and consequently that an action will not lie in this country on a contract made in a foreign country, and valid there, which, if made here, would have been incapable of being sued on by reason of this section.(*b*) This decision, though still law, has not escaped criticism,(*c*) and is difficult to reconcile with the well settled rule(*d*) which requires that the writing relied on as taking a case out of the statute should be in existence before action brought; a requirement which would be unreasonable and contrary to the usual practice, if it related only to procedure and did not go to the solemnities of the contract.

§ **477**. It is obvious that in many cases a defense to an action for specific performance may be grounded upon this fourth section of the Statute of Frauds. It is, therefore, proposed to consider (1) how such a defense may be raised, and (2) what constitutes a sufficient agreement or memo-

(*a*) 29 Car. II, c. 3.

(*b*) Leroux v. Brown, 12 C. B., 801.

(*c*) Williams v. Wheeler, 8 C. B. N. S., 299, 316; Gibson v. Holland, L. R. 1 C. P., 8. The case is, however, cited as an authority for the proposition that the signature required by the fourth section is matter of procedure in the judgment of the Queen's Bench Division in Jones v. Victoria Graving Dock Co., 2 Q. B. D., 323.

(*d*) Bill v. Bament, 9 M. & W., 36.

randum or note of agreement within the meaning of the statute. And as, notwithstanding the express language of the statute, it was held by the court of chancery, and is now the law of the land, that certain circumstances may preclude a defense founded upon the statute, it is necessary to consider a third question, namely, (3) what, according to the principles of equity, takes a contract out of the statute.[1]

1. *How the defense may be raised.*[2]

§ 478. In order to make intelligible the decisions on the present mode of pleading, it will be necessary to state briefly

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[1] *States in which the contract is void, if not in conformity with the statute.*] The English statute (Mercantile Law Amendment Act, 19 and 20 Vic., 1856) has been in substance re-enacted in many of the States. In the following the contract is void, if not in conformity with the provisions of the statute: Alabama Code, 1867, § 1862; California Code, § 1741; Michigan Comp. Laws, 1871, vol. 11, p. 1455, ch. 166, § 8; Minnesota Stats., 1873, vol. 1, p. 692, § 12; Nebraska Stats., 1873, p. 392, ch. 25, § 5; New York Rev. Stats. (6th ed.), vol. 3, p. 141; Oregon Gen. Laws, 1872, ch. 8, § 775; Wisconsin Stats., 1871, vol. 11, ch. 106, § 8.

"*The statute is not a mere rule of evidence,* but a limitation of judicial authority to afford a remedy. It requires that contracts for the sale of lands, in order to be enforced by judicial proceedings, must be substantiated by some writing. This provision of law cannot be dispensed with, merely for the reason that the want of such writing was occasioned by mistake, accident or fraudulent representations, unless some other ingredient enters into the case to give rise to equities stronger than those which stand upon the oral contract alone, which estop the other party from setting up the statute." Wells, J., in Glass v. Hulbert, 102 Mass., 25; Stockbridge Iron Co. v. Hudson Iron Co., id., 45.

Assignee's contract to pay original purchase money.] The assignee of a bond for title, entered into a contract to pay the purchase money to the original vendor. Held, that it was not a parol promise to pay the debt of another, nor a parol contract for the sale of land, and that it would be specifically enforced. Ford v. Finney, 35 Ga., 258.

Securities.] "The words of the statute have never yet been extended by any court beyond securities which are subjects of common sale and barter, and which have a visible and palpable form." Somerly v. Buntin, 118 Mass., 279, *per cur.* Gray, C. J.

Examples of promise within the statute.] A judgment to sell a stock of goods, and, as a part of the transaction, the seller verbally agreed to give the purchaser a three years lease of the store—Held, within the statute, and the action dismissed. Strahl v. Evers, 66 Ill., 77; Schulter v. Bockwinkle, 19 Mo., 674; William and Mary's Col. v. Powell, 12 Gratt., 372; Bryant v. Jamison, 7 Mo., 106.

[2] In order that a bill may be taken advantage of under these circumstances, it must not only show the want of an agreement conformable to the statute of frauds, but it must also omit to make any allegations of part performance. Thus, in the case of Field v. Hutchinson, 1 Beav., 599; S. C., 3 Jur., 795, it is said, "where the want of a signature to an agreement for the sale of lands clearly appears on the bill, the objection may be taken advantage of by general demurrer; but the statements of this bill not being inconsistent with a signature by the party to be charged, and containing allegations of part performance, a general demurrer thereto was overruled."

what was the method of taking advantage of the statute before the judicature acts.

§ **479**. Under the old practice, then, the want of a contract within the statute might, when clearly appearing on the bill, have been taken advantage of by general demurrer,(*e*) or by a demurrer alleging the want of such a contract.(*f*) In this respect, there was held to be a wide difference between the Statute of Frauds and the statute of limitations.(*g*)

§ **480**. The benefit of the statute might also have been had by plea; and, notwithstanding a doubt of Lord Macclesfield,(*h*) by plea alone and without answer.

§ **481**. To a bill alleging a parol contract and part performance, a plea averring that there was no contract in writing, and an answer insisting that the alleged acts did not amount to part performance, was a sufficient defense.(*i*) Though such a bill could not, it seems, have been met by a plea alone, for a plea in bar to such a bill would contain two distinct points—namely, the denial of the written contract and of the acts of part performance, and would therefore have been multifarious and bad.(*j*)[1]

§ **482**. The benefit of the statute might also have been obtained by the defendant's answer; and either by an answer denying or not admitting the contract (which was sufficient, without special reference to the statute, to throw upon the plaintiff the whole burthen of proving a valid

(*e*) Field v. Hutchinson, 1 Beav., 599; cf. Heard v. Pilley, L. R. 4 Ch., 548.

(*f*) Wood v. Midgley, 5 De G. M. & G., 41; S. C., 2 Sm. & Gif., 115; Barkworth v. Young, 4 Drew, 1. See, also, Howard v. Okeover, 3 Sw., 421 n.

(*g*) Per Lord Cranworth in Ridgway v. Wharton, 3 De G. M. & G., 691; Heys v. Astley, 4 De G. J. & S., 34.

(*h*) Child v. Godolphin, 1 Dick, 39.

(*i*) Whitchurch v. Bevis, 2 Bro. C. C., 559; S. C., 2 Dick., 664. See, also, Hosier v. Read, 9 Mod., 86; Moore v. Edwards, 4 Ves., 23; Bowers v. Cator, id., 91; Evans v. Harris, 2 V. & B., 361.

(*j*) Whitbread v. Brockhurst, 1 Bro. C. C., 404; and see Belt's n. and Redes. Plead., 268. See, also, as to this plea, Child v. Comber, 3 Sw., 423 n.; for a plea to a parol contract varying a written one, Jordan v. Sawkins, 3 Bro. C. C., 388; and for a plea alleging revocation of agency, Mason v. Armitage, 13 Ves., 25.

[1] The case of French v. Shotwell, 5 John. Ch., 555, is a somewhat analogous case. There, to a bill for relief against a judgment, on the ground of fraud, a plea of the judgment, and an answer denying the fraud, were held good. A plea must contain a denial of all the facts charged in the bill which would, if true, defeat the plea; and it must reduce the defense to a single point. Bogardus v. Trinity Church, 4 Paige, 178: Saltus v. Tobias, 7 John. Ch., 214. If a plea be double, the plaintiff may demur for duplicity; but, if he reply, he must answer both parts of the plea. Barrett v. Ruill, 3 Ired., 381.

contract capable of being enforced),(*k*) or by an answer admitting a contract, and expressly pleading the statute.(*l*)

§ **483**. If the benefit of the statute was not claimed in one or other of these ways, it could not be had at the hearing.(*m*)

§ **484**. A great change has been effected by the provisions of the judicature acts in this matter. Order XIX, r. 23, provides that "When a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise." Pleas, it may be added, find no place in the present system of pleading.

§ **485**. From these provisions, the following inferences have been or may be drawn, viz.:

(1) That the benefit of the statute can no longer be had by plea.

(2) That where the statement of claim alleges a contract without alleging it to be in writing, a demurrer will not now lie, but the statute must be specially pleaded ;(*n*) and this has been held to apply even to a case in which the statement of claim alleged circumstances in anticipation of an objection grounded on the statute, and these circumstances were traversed by the defense.(*o*)[1]

(3) That where the statement of claim itself shows that the contract was not in writing, and does not show any equitable circumstances taking it out of the statute, then the statute may be taken advantage of by demurrer. This point has not yet, it is believed, been the subject of direct decision.(*p*)

(*k*) Ridgway v. Wharton, 3 De G. M. & G., 677, S. C. in D. P., 6 H. L. C., 238.

(*l*) Cooth v. Jackson, 6 Ves., 12; Moore v. Edwards, 4 id , 23; per Lord Eldon in Rowe v. Teed, 15 id., 375; Blagden v. Bradbear, 12 id , 466; per Lord Eldon in ex parte Whitbread, 19 id., 212. See contra, Mussell v. Cooke, Prec Ch., 533

(*m*) Baskett v. Cafe, 4 De G. & Sm , 388.

(*n*) Catling v. King, 5 Ch D , 660, 663; Towle v. Topham, 37 L T., 308; Shardlow v. Cotterill, W. N. (1881), 2.

(*o*) Clarke v. Callow, 46 L. J. Q. B., 53. See, also, Johnasson v. Bonhote, 2 Ch. D., 298

(*p*) It appears that this may be inferred from the decision in Vale of Neath Colliery Co. v. Furness, 24 W. R., 631.

[1] A defendant in a suit in chancery cannot put in several distinct defenses, by plea, to the whole of the complainant's bill, or to the same part of the bill, without the special leave of the court. Nor can he set up two distinct defenses in the same plea without rendering such plea bad for duplicity. To justify the court in departing from this general rule, the defendant must make out a very special case of hardship and inconvenience to him if he should be required to make his several defenses by answer. Where it would be necessary to set out

(4) That where a pleading states a contract generally, the opposite party's proper mode of claiming the benefit of the statute is to plead it specially in his next pleading.

(5) That to such pleading the old rule applicable to answers applies, viz., that the benefit of the statute must be claimed distinctly and unambiguously. Under the former practice it was held that when the answer alleged that no formal note of the contract was made, and denied that any binding contract ever existed, but did not expressly claim the benefit of the statute, the defendant was not entitled to have that benefit at the hearing.(*q*) It is not necessary that the defendant should claim the benefit in the very words of the statute, but he must claim it in words equivalent, so as to call the attention of the other party to the circumstance that the benefit of the statute is claimed.(*r*)

(6) If the plaintiff deliver a statement of claim, and the defendant deliver no defense or demurrer, it appears clear that the defendant cannot set up the statute at the hearing of the plaintiff's motion for judgment, for then the court is to give such judgment as upon the statement of claim the court shall consider the plaintiff to be entitled to.(*s*)

(7) If the plaintiff indorse his writ for specific performance of a contract and deliver no statement of claim, and the defendant deliver no defense, it would seem equally clear that the defendant cannot have the benefit of the statute.[1]

2. *What satisfies the statute.*[2]

§ 486. The object of the Statute of Frauds being, as re-

(*q*) See Skinner v. McDowall, 2 De G. & Sm., 265.

(*r*) Per Wigram, V. C., in Beatson v. Nicholson, 6 Jur., 621. Cf. as to the distinctness of pleading now required, Byrd v. Nunn, 7 Ch. D., 284.

(*s*) See Ord. XXIX, r. 10.

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very long accounts, and in cases where the discovery sought by the bill would be productive of injury to the defendant in his business, the court will grant its indulgence. Didier v. Davison, 10 Paige, 515.

[1] This is clearly the rule. Osborn v. Endicott, 6 Cal , 149; Lingan v. Henderson, 1 Bland, 236; Kinzie v. Penrose, 2 Scam , 520; Thornton v. Henry, id., 218; Talbot v. Bower, 1 A. K. Marsh., 436; Bean v. Valle, 2 Miss., 126; Tarleton v. Victes, 1 Gilm,, 470; Woods v. Dille, 11 Ohio, 405; Small v. Ownings, 1 Md. Ch Dec., 363; Hollingshead v. McKenzie, 8 Geo., 457.

[2] *What the writing must contain to satisfy the statute.*] It may be informal, but it must contain all the terms of the contract, either expressly or by necessary inference. In it must be found the names of the parties, the consideration, the subject matter, the promise and the signature of the party sought to be charged; nothing must be left open for future negotiation. Laythoarp v. Bryant, 2 Bing. (N. C.), 735; Ogilvie v. Foljambe, 3 Mer., 53; Nichols v. Johnson, 10

gards the contracts now under consideration, to prevent the mischief arising from the resort to parol evidence to prove the existence and the terms of the alleged contract, it is obvious that the mischief is avoided wherever there exists, under the hand of the party sought to be charged, a written statement containing, either expressly or by necessary inference, all the terms of the contract—that is to say, the parties (described either by names or descriptions or reference sufficient to preclude any fair dispute as to their identity).(*t*) the subject matter of the contract,(*u*) the consideration and the promise(*v*)—and leaving nothing open to future treaty.(*w*)

§ 487. This, therefore, is sufficient to satisfy the statute, and provided this be found, no formality is required, nor does it signify at all what is the nature or character of the document containing such written statement—whether it be a letter written by the party to be charged to the person with whom he contracted, or to any other person, or a deed, or other legal instrument, or an affidavit.(*x*)[1]

(*t*) Potter v. Duffield, L. R. 18 Eq., 4. See, for a further discussion of the mode of description, Part III, chap. iii, § 330 et seq., where the cases are cited.

(*u*) See Nene Valley Drainage Commissioners v. Dunkley, 4 Ch. D., 1, where a plan on which the parties, contemporaneously with their signature of the contract (which did not refer to any plan), signed a memorandum referring to the contract, was held to be sufficiently incorporated with the contract, and to control the description in it.

(*v*) Laythoarp v. Bryant, 2 Bing. N. C., 735.

(*w*) Ogilvie v. Foljambe, 3 Mer., 53.

(*x*) Barkworth v. Young, 4 Drew, 1, 14.

Conn., 192; Doty v. Wilder, 15 Ill., 407; McConnell v. Brillhard, 17 id., 354; Johnson v. Dodge, id., 433; McFarson's App., 11 Pa. St., 503; Sanborne v. Flagler, 9 Allen, 474; Stone v. Browning, 68 N. Y., 598; Helsa v. Helsa, 8 Mo., 393; Huff v. Shepard, 58 id., 242. It need not be sealed nor acknowledged, and words of inheritance need not be employed, where an intention to pass the fee appears. McFarson's App., 11 Pa. St., 503. The writing may be by a pleading, an affidavit or a receipt, and it may be found in one or more letters It may be in the language of both parties, or either of them. Barkworth v. Young, 4 Drew, 13; Ewing v. Gordon, 49 N. H., 444; Tripp v. Bishop, 56 Pa. St., 424; Joseph v. Holt, 37 Cal., 250; Welford v. Beazely, 3 Atk., 503; Dentson v. McKenzie, 1 Dessau.'s Eq., 289. The entire agreement must be written or printed, and may be in pencil. Cary v. Hyde, 49 Cal., 470; Patton v. Develin's, 2 Phila., 103; Draper v. Pattina, 2 Speers, 292; Merritt v. Clasor, 12 Johns., 484. A contract by parol, or in writing, is presupposed by the statute of frauds. The memorandum, which is necessary to its validity, and the agreement itself, are very different things; one may be made at one time, and the memorandum at some other. If the promise of one of the parties is the consideration for the promise of the other, in such case both must be concurrent, and obligatory upon both at the same time. Lester v. Sennett, 12 Barb., 502; Jones v. Noble, 3 id. (Ky.), 694; Yerger v. Green, 4 Gill, 472; Duvall v. Myers, 2 Md. Ch., 401.

[1] In Barry v. Coombe, 1 Pet., 640, it is said that courts of equity are not rigid with regard to the direct and immediate purpose for which the written evidence of a contract was created: "It is written evidence that the statute of fraud requires, and a note or letter may be sufficient to bring the case within the statute." Thus the following paper was held to be a sufficient memoran-

The question of what is necessary to be settled, and therefore what is necessary to be expressed, in order that a writ-

dum of the terms of an agreement to sell land within the statute of frauds: "Ellsworth, Dec. 15th, 1834. Received of D. B. and C. S. C. $1,000, to be accounted for, if they shall furnish me satisfactory security for certain lands on the Naraguagas river, say 119,000 acres for $113,000, on or before Friday morning next: otherwise to be forfeited—John Black." Clark v. Burnham, 2 Story, 1. And a receipt in these terms: "Received from A. $20, on account of the purchase of a house and lot, No. 38 Hammond street, at $2,900, subject to a lease to B. for four years from the first of May next: $1,000 may remain by bond and mortgage: the balance the first of May, when the deed will be executed and possession given"—amounts to a valid contract for the sale of land, under the statute in New York. Westervelt v. Matheson, 1 Hoff. Ch, 37. Again, in Hatcher v. Hatcher, 1 McMullan's Ch., 311, land having been sold on execution against A., B. agreed, by parol with A., to advance the money to the purchaser at the sheriff's sale, to take a conveyance to himself, and to reconvey to A. upon being reimbursed for the sum so advanced. Upon a subsequent payment by A., under the agreement, B. gave him a written receipt therefor, as in part payment of the land, describing it, and concluding thus: "This in part payment to redeem the land from B." It was held, that there was a sufficient memorandum of the contract, within the statute of frauds, and that extraneous written evidence was admissible to show the consideration. Thomas v. Todd, 3 Litt., 337, is a case somewhat in point It was there held, that an advertisement describing the situation and quality of land, signed by a vendor, and being the only printed or written memorandum of the contract on his part, was held to contain the particulars with which he was bound to comply; and where he was unable to do so, the contract for a purchase of the land was decreed to be rescinded. See Gray v. James, 4 Dessau., 185; Little v. Peason, 7 Pick., 301, is a case of the same nature There A. paid B. $100, receiving from B. a note payable to A. or order, on demand for $100 and interest, with the following memorandum: "N. B. This note is to be given up when I give him a deed of the land, which I have engaged to give him." Signed by B. It was held that this was a sufficient memorandum whereby to compel a conveyance. But the following writing, to wit: "4th January, 1808. Received of J. E. $——, in part pay of a lot bought of me, in the town of V., it being the cash part of the purchase of said lot. Nathan Deadman. Test., Will. Atwood"—was held not to be a sufficient memorandum to take the agreement out of the statute. Ellis v. Deadman, 4 Bibb, 466 A memorandum must contain, within itself, or by reference to some other writing, the terms of the agreement with reasonable certainty. Parkhurst v. Van Cortland, 1 John. Ch., 274; Coles v. Bowne, 10 Paige, 526. Therefore where A. proposed, in writing, to sell to B., all that piece of property known as the Union Hotel property," it was held not to be a sufficient description to take the case out of the statute of frauds, parol evidence being necessary to show what property was comprehended under the words "Union Hotel property." King v. Wood, 7 Miss., 389. But the memorandum need contain only the substance of the contract, and not a detail of all particulars; so that if the memorandum recognize that an estate, chargeable with certain annuities, is sold subject to them, by mentioning when the payment of the annuities by the purchaser is to begin, it is sufficient. Ives v. Hazard, 4 R. I., 14; see Kay v. Curd, 6 B. Monr., 100. Handbills and newspaper notices, published at the time of the sale, are not admissible as explanatory evidence, the memorandum containing no reference to them. O'Donnell v. Leman, 43 Me., 158. Whether or not the consideration must be expressed upon the face of the instrument, is subject to different rules in the different States. In England the question has long since been well-settled. There the leading decision on the subject is Wain v. Warlters, 5 East, 16, decided at law by Lord Ellenborough, who then took occasion to explain the meaning of the word *agreement*, as used by the Statute of Frauds, defining it to be a mutual contract between two or more parties," and excluding its more loose acceptation of a *promise* or an *undertaking*. He said that the statute was never meant to enforce any promise which was before invalid, merely be-

ten memorandum shall be evidence of a completed contract will be found more fully discussed in the chapter(*y*) on the incompleteness of the contract.[1]

(*y*) Part III, chap. iii. And see Blakeney v. Hardie, I. R. 8 Eq., 381; Carrigy v. Brock (collateral contract), I. R. 5 C. L., 501.

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cause it was put in writing; that a promise, without a consideration, was a mere *nudum pactum;* and that the object of the statute would be defeated if the consideration were not expressed, as, in that case, it might be illegal, or the promise made upon a condition precedent, which the party charged may not afterwards be able to prove, the omission of which might materially vary the promise by turning that into an absolute promise which was only a conditional one. This decision has been sustained in Stadt v. Lill, 9 East, 348; Jenkins v. Reynolds, 3 Brod. & Bing., 14; Saunders v. Wakefield, 4 B. & Ald., 495; Morley v. Boothly, 3 Bing., 107; Cole v. Dyer, 1 Cr. & Jr., 461; James v. Williams, 3 Nev. & Man., 196; Clancy v. Piggott, 4 id., 496; Raikes v. Todd, 8 Ad. & El., 846; Sweet v. Lee, 3 M. & Gr., 452; Bainbridge v. Wade, 16 Q. B., 89. The strict meaning of the word *agreement*, as defined in Wain v. Warlters, should be borne in mind, as in cases arising under the seventeenth section of the statute, which does not contain the word *agreement*, the consideration need not be expressed. Egerton v. Mathews, 6 East, 307; Marshall v. Linn, 6 M. & W., 118. The ruling in Wain v. Warlters has been approved in Sears v. Brink, 3 John., 210; Rogers v. Kneeland, 10 Wend., 218; Packard v. Wilson, 15 id., 343; Bennett v. Pratt, 4 Denio, 275; Staats v. Howlett, id., 559, and has become the statute law of New York. 2 R. S., pt. 2, ch. 7, tit. 2, § 2. In Maryland and Georgia, decisions have been given to the same effect. Wyman v. Gray, 7 Har. & John., 409; Elliot v. Giese, 7 id., 457; Edelen v. Gough, 5 Gill, 103; Henderson v. Johnson, 6 Geor., 390. But the contrary doctrine has been upheld in Packard v. Richardson, 17 Mass., 112; Sage v. Wilcox, 6 Conn., 81; Tufts v. Tufts, 3 M. & W., 456; Reed v. Evans, 17 Ohio, 128; Gitlighan v. Boardman, 29 Me., 79. In some of the States the language of the statutes has been changed, and the English doctrine, resting upon the meaning of the word agreement, repudiated. Violett v. Patton, 5 Cranch, 142; Taylor v. Rose, 3 Yerg., 330; Gilman v. Kibler, 5 Humph., 19; Wren v. Pearse, 4 Sm. & Marsh., 91. Where an instrument of guaranty is under seal, this expresses sufficient consideration to be deemed a compliance with the statute requiring it to be expressed. Rosenbaum v. Gunter, 16 N. Y. (2 Smith), 415. And where the consideration of a written guaranty is expressed to be for value received, it is sufficient under the Statute of Frauds. Cooper v. Dedrick, 22 Barb., 516; Day v. Elmore, 4 Wis., 190. If a contract be in its nature entire, and in one part it satisfies the statute, and in another it does not, then, it has been decided at law, it is altogether void. Cooke v. Toombs, 2 Anstr., 420; Lea v. Barber, id., 425; Charter v. Beckett, 7 Term R., 201; Vaughan v. Hancock, 3 C. B., 766; Lexington v. Clarke, 2 Vent., 223; Mechelen v. Wallace, 7 Ad. & El., 49; Thomas v. Williams, 10 B. & Cr., 664; Loomis v. Newhall, 15 Pick., 159. In Irvine v. Stone, 6 Cush., 508, it was held that a contract for the purchase of coals at Philadelphia, and to pay for the freight of the same to Boston, if void by the Statute of Frauds as to the sale, is void also and cannot be enforced as to the freight; though the latter, if it stood alone, would not be within the statute. See Thayer v. Roch, 13 Wend., 53. But if the parts are severable, then it may be good in part and void in part. Mayfield v. Wadsley, 3 B. & C., 357.

[1] *Subject matter of contract insufficiently described.*] The memorandum relating to real estate in the following cases was indefinite, and therefore insufficient: Holmes v. Evans, 48 Miss., 247; Pipkin v. James, 1 Humph., 325; Meadows v. Meadows, 3 McCord, 458; Church of the Advent v. Farrow, 7 Rich's Eq., 378; Ray v. Curd, 6 B. M., 100; Ives v. Armstrong, 5 R. I., 567; Sheid v. Stamps, 2 Sneed, 172; Farwell v. Mather, 10 Allen, 322.

Examples where the description was held to be sufficient.] If a surveyor can locate it, a contract is sufficiently descriptive. White v. Hermann, 51 Ill., 283; Wiley v. Robert, 27 Mo., 388; Boardman v. Ford, 6 Pet., 345; Hooper v.

§ 488. There is, of course, no binding contract when the writing appears only to be terms agreed on as a basis for a contract, and not the contract itself;(*z*) or where it provides that any of the terms are afterwards to be settled;(*a*) or where the matter is unconcluded, and one party may still withdraw his consent;(*b*) or where there appears any design of further negotiation;(*c*) or where one of the parties was, at the time when the memorandum was signed—which is the point of time at which the statute requires the plaintiff to prove a concluded contract existing(*d*)—incapable of contracting bindingly.(*e*) Therefore where the purchaser's solicitor offered £25,000 for the purchase of an estate, which the defendant's agent accepted, "subject to the terms of a contract being arranged between his (the vendor's) solicitor and yourself," the court considered this to be a contract to enter into a contract with respect to which some terms were already agreed on, and the rest were to be settled by future arrangement, and that if they could be agreed on, this was to become a valid contract; but such a contract never having been come to, the court dismissed the purchaser's bill asking for a specific performance.(*f*) On this principle the ap-

(*z*) Frost v. Moulton, 21 Beav., 596.
(*a*) Wood v. Midaley, 5 De G. M. & G., 41.
(*b*) Earl of Glengal v. Barnard, 1 Ke., 769, affirmed as Lord Glengal v. Thynne, St. Leon. Law of Prop., 56. See, too, Hussey v Horne-Payne, 4 App. C., 311.
(*c*) Tawney v. Crowther, 3 Bro. C. C., 318; Stratford v. Bosworth, 2 V. & B., 341; Wilcox v. Redhead, 28 W. R., 795.
(*d*) Munday v Asprey, 13 Ch. D., 857.
(*e*) Avery v. Griffin, L. R. 6 Eq., 606.
(*f*) Honeyman v. Marryat, 21 Beav., 14; S. C., 6 H. L. C., 112. See, too, Winn v. Bull, 7 Ch. D., 29. Whether the expression in the memorandum that the contract is subject to the approval of the title by the purchaser's solicitor is enough to make the contract conditional appears doubtful. Compare the observations of Lord Cairns in Hussey v. Horne-Payne, 4 App. C., 321, 322, with the judgments of the Court of Appeal in S. C., 8 Ch. D., 675 et seq. See, also, Hudson v. Buck, 7 Ch. D., 683.

Laney, 37 Ala., 338; Hatcher v. Hatcher, 1 McMullan's Eq., 311; Moss v. Anderson, 44 Cal., 3; Simmons v. Spruill, 3 Jones' Eq., 9; Ives v. Hazard, 4 R. I., 14; Spangler v. Danforth, 65 Ill., 152; Simpson v. Breckenridge, 32 Pa. St., 287.

Parol evidence to identify the property sold.] Wells, J., in Hurley v. Brown, 98 Mass., 545, says: "It is not a question of the sufficiency of the writing under the Statute of Frauds, so much as it is the right to resort to parol evidence in aid of the writing where an ambiguity exists in respect to the property intended to be sold, or to which the contract relates. The most specific and precise description of the property intended requires some parol proof to complete the identification. A more general description requires more. When all the circumstances of possession, ownership, situation of the parties, and their relation to each other and to the property, as they were when the negotiation took place and the writing was made, are disclosed, if the meaning and application of the writing, read in the light of those circumstances, are certain and plain, the parties will be bound by it as a sufficient written contract or memorandum of their agreement." See, also, Ross v. Parker, 72 Pa. St., 186; Murdock v. Anderson, 4 Jones' Eq., 77; Mead v. Parker, 115 Mass., 413; see, as to usage and customs in trade, Salmon Falls Manuf'g Co. v. Goddard, 14 How., 446; Barry v. Combe, 1 Pet., 640.

proval of a draft does not of itself constitute a contract.(*g*)

§ **489**. The court will refuse to act even where it only "rests reasonably doubtful whether what passed was only treaty, let the progress towards the confines of agreement be more or less."(*h*)

§ **490**. But the mere fact, though appearing on the paper, that a more formal contract is intended to be executed, will not prevent a paper duly signed and containing all the terms from being a contract, any more than will a reference to deeds thereafter to be executed.(*i*) Therefore where A. wrote to B., "I offer you £3,000 for the estate," and B. replied, "I accept your offer, and, if you approve of the inclosed, sign the same, and I will, on receipt of the deposit, sign you a copy" (the inclosure was not produced), the court held that there was a binding contract, and treated the inclosure as a mere means of carrying that contract into effect;(*j*) and in another case, a correspondence about the taking of a house was held to constitute a sufficient contract, though the agent of the lessor accepted the offer thus, "These terms I have submitted to Mrs. S., and I am authorized to say they are accepted, and that her solicitor will draw up a proper agreement for signature, which I will forward to you."(*k*)

§ **491**. But wherever the formal contract contemplated is to be anything more than merely ancillary to the real contract—wherever any new term not expressed or implied in the earlier contract might be introduced into the formal one, the first document will not by itself be binding. And wherever the concluded nature of the arrangement does not evidently appear on the writings, the fact that a subsequent and more formal contract was intended to be entered into will be strong evidence that the previous negotiations were not intended to amount to a contract.(*l*)[1]

(*g*) Doe d. Lambonrn v. Pedgriph, 4 Car. & P., 312.

(*h*) Per Lord Eldon in Huddleston v. Briscoe, 11 Ves., 592.

(*i*) Fowle v. Freeman, 9 Ves., 351; Kennedy v. Lee, 3 Mer., 441. See per Lord Cranworth in Ridgway v. Wharton, 6 H. L. C., 264; per Lord Langdale, M. R., in Thomas v. Dering, 1 Ke., 741; Cowley v. Watts, 17 Jur., 172; and supra, § 280.

(*j*) Gibbins v. North Eastern Metropolitan Asylum District, 11 Beav., 1.

(*k*) Skinner v. M'Dowall, 2 De G. & Sm., 265.

(*l*) Ridgway v. Wharton, 6 H. L. C., 238, and particularly pp. 268, 305.

[1] *How to make a binding contract within the statute.*] Where the written memorandum itself does not contain all the particulars of the agreement, it must refer to some other writing for the parts omitted. It may consist of many parts, but all must be connected, and form together the entire agreement con-

§ **492**. In the case of Chinnock v. The Marchioness of Ely,(*m*) the plaintiff had proposed certain terms of purchase to the defendant's agents, who had replied to the plaintiff that they were instructed by their client to proceed with the sale to him, and that a draft contract was being prepared and would be forwarded to him for approval in a few days. It was contended on the plaintiff's behalf that this letter clearly recognized the fact that there had been a complete sale to him, and also amounted to a distinct acceptance of certain terms previously stated by him in writing. But it was held by Lord Westbury that the true meaning of the letter was that the defendant was willing to accept the plaintiff's terms, if the plaintiff would agree to the draft contract about to be sent to him. "I entirely accept," said his lordship,(*n*) "the doctrine contended for by the plaintiff's counsel, and for which they cited the cases of Fowle v. Freeman,(*o*) Kennedy v. Lee,(*p*) and Thomas v. Dering,(*q*) which establish, that if there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the statute of frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties. As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his agent lawfully authorized, there exist all the materials, which this court requires, to make a legally binding contract. But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the con-

(*m*) 4 De G. J. & S., 638.
(*n*) 4 De G. J. & S., 645.
(*o*) 9 Ves., 351.
(*p*) 3 Mer., 441.
(*q*) 1 Ke., 729.

templated. If letters are relied upon, they must distinctly recognize and adopt the contract. Allen v. Bennett, 3 Taunt., 169; Powell v. Dillon, 2 B. & B., 416; Esmay v. Gorton, 18 Ill., 483; Tallman v. Franklin, 14 N. Y., 584; Common v. Ray, 3 Gray, 447: Williams v. Bacon, 2 id., 387; Marsh v. Hyde, 3 id., 333; Merton v. Dean, 13 Metc., 385; Lerned v. Wannemacher, 9 Allen, 412; Bourland v. County of Peoria, 16 Ill., 538; Johnson v. Dodge, 17 id., 433; Long v. McLaughlin, 14 Minn., 72; Sanborn v. Flagler, 9 Allen, 474. A telegram was sent, and a letter sent the same day, stating that a proposition had been accepted by telegraph. Held, sufficient subscription to take the case out of the statute of frauds. Trevor v. Wood, 36 N. Y., 397; Hazard v. Day, 14 Allen, 487.

tract is a term of the assent, and there is no agreement independent of that stipulation."

§ **193**. The law upon this point has been summarized as follows by Jessel, M. R.:(*r*) "It comes, therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement, the terms of which are not expressed in detail." In that case accordingly a writing purporting to be a contract for a loan, but expressed to be "made subject to the preparation and approval of a formal contract," was held not to be a concluded contract.(*s*)[1]

(*r*) In Winn v. Bull, 7 Ch. D., 32. See Rummens v. Robins, 3 De G. J. & S., 88; Oxford v. Provand, L. R. 2 P. C., 135; Watts v. Ainsworth, 31 L. J. Ex., 448; Heyworth v. Knight, 33 L. J. C. P., 298.

(*s*) See, too, Brien v. Swainson, 1 L. R. Ir., 135.

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[1] *Several writings, parol evidence to contract.*] Where there are several writings, one containing the terms of the agreement, and the other the signed agreement which directly refers to the others, the paper referred to may be identified by parol. This must not, however, be understood as enlarging the scope of parol evidence. Clinan v. Cooke, 1 Sch. & Lef., 33; Noale v. Buchanan, 11 Gill. & John., 314; Tallman v. Franklin, 14 N. Y., 584; Inhab of Freeport v. Bartol, 3 Me., 340; Carter v. Shorter, 57 Ala., 253; Rhoades v. Castner, 12 Allen, 130. There must be no possibility for the substitution of another paper, where parol evidence is relied upon to connect one writing with another, and the paper referred to must be in being when the agreement is signed. Smith v. Arnold, 5 Mason, 416; Waul v. Kirkman, 27 Miss., 323; Stocker v. Partridge, 2 Rob., 193; Hyde v. Cooper, 13 Rich.'s Eq., 250. An imperfect memorandum was attempted to be aided by hand-bills and newspaper notices signed by the defendant, and exhibited by him at the time of the sale, in which the terms of the sale were stated. Held, that the memorandum could not be so aided. O'Donnell v. Leeman, 43 Me., 158.

The memorandum must contain the substantial terms of the contract.] "The jurisdiction of equity, in specific performance, proceeds on the supposition that the parties have not only agreed, as between themselves, upon every material matter, but that the matters so agreed on are of such a nature, and the subjects of agreement so delineated or indicated, either directly or by reference to something else, or so raised to view by legitimate implication, that the court can and may collect—and in their proper relations—all the essential elements, and proceed intelligently and practically in carrying into execution the very things agreed upon, and standing to be performed." Graves, C. J., in Blanchard v. Detroit R. R. Co., 31 Mich., 43; Blagden v. Bradbear, 12 Ves., 466; Parkhurst v. Van Courtlandt, 1 John's Ch., 273; Smith v. Stanton, 15 Vt., 685; Adams v. McMillin, 7 Porter, 43; Abeel v. Radcliff, 13 John., 297; Calkins v. Falk, 39 Barb., 620; Grace v. Denison, 114 Mass., 16; Mayer v. Adrian, 77 N. C., 83.

Receipt for purchase money, when sufficient.] Where the vendor of real estate signs a receipt for a part of the purchase money, this may constitute a suffi-

§ **494**. "If," said Jessel, M. R, in another case, "there is a simple acceptance of an offer to purchase, accompanied by a statement that the acceptor desires that the arrangement should be put into some more formal terms, the mere reference to such a proposal will not prevent the court from enforcing the final agreement so arrived at. But if the agreement is made subject to certain conditions then specified or to be specified by the person making it, or by his solicitor, then, until those conditions are accepted, there is no final agreement such as the court will enforce.(*t*)

§ **495**. In a case in which estate agents received an offer for sale, and replied that they were instructed to accept it, and had asked their principal's solicitor "to prepare contract," it was held that notwithstanding these words the acceptance was complete.(*u*)

§ **496**. In the case of Rossiter v. Miller,(*v*) the agent of the plaintiffs (vendors) wrote to the defendant (purchaser) reciting a parol offer which the defendant had made to him, and accepting it on behalf of the plaintiffs, and said: "I have requested Messrs. H. & M. to forward you the agreement for purchase." The purchaser replied in terms of acceptance; and it was held by the House of Lords that the contract was complete, notwithstanding the expressed intention to forward a formal contract.

§ **497**. The statute requiring that the agreement, or the memorandum or note thereof, shall be signed by the party to be charged therewith, or his agent, and not requiring that it shall be signed by both parties to the contract, it has

(*t*) Crossley v. Maycock, L. R. 18 Eq., 181.
(*u*) Bonnewell v. Jenkins, 8 Ch. D., 70.
(*v*) 3 App. C., 1124, reversing the decision of the Court of Appeal, 5 Ch. D., 648. Cf. the observations of James, L. J., in Smith v. Webster, 3 Ch. D., 56, and distinguish Brien v. Swainson, 1 L. R. Ir., 135.

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cient memorandum of sale, where it describes the land sold, and states the price. Westervelt v. Matherson, 1 Hoffm.'s Ch., 36; Barrickman v. Kuykendell, 6 Black., 21; Ellis v. Deadman, 4 Bibb., 466; Soles v. Hickman, 20 Pa. St., 180; Holman v. Bank of Norfolk, 12 Ala., 369.

All the terms of the contract must be assented to on both sides, in order to take such contract out of the statute by letters. Nesham v. Selby, L. R., 13 Eq., 191; aff'd, L. R., 7 Ch., 406.

States in which the consideration need not be expressed in the writing.] Illinois, St. of 1877, vol. 3, p. 210, §§ 1, 2; Indiana, St., ch. 66, § 1; Kentucky, R. S., ch. 22, § 1; Maine, R. S., ch. 3, § 1; Massachusetts, Gen. St., 1873, ch. 105, § 2; Michigan, Comp. Laws, 1871, ch. 166, § 9; Nebraska, St., 1873, ch. 25, § 24; Virginia, Code 1849, ch. 143, § 1; West Virginia, Code, ch. 98, § 1.

been held both in the courts of equity,(*w*) and common law,(*x*) that a signature by the party against whom the contract is sought to be enforced is sufficient.

§ 498. The statute requires a signature and not a subscription ;(*y*) therefore all that is requisite to satisfy the statute as to the signature is, that the name be inserted by the party in such a manner as to govern and authenticate the entire instrument. Accordingly, a letter beginning "Mr. Foljambe presents his compliments" was held duly signed.(*z*) The same was the case where A. wrote, "A. has agreed," etc.;(*a*) and where B. wrote "A. agreed with B.," etc.(*b*) An affidavit made by a person has been also held sufficient.(*c*)[1]

(*w*) See supra, § 449.
(*x*) Egerton v. Mathews, 6 East, 307; Allen v. Bennet, 3 Taunt., 169; Laythoarp v. Bryant, 3 Bing. N. C., 735. See the editors' note to Sweet v. Lee, 3 Man. & Gr., 462.
(*y*) Per Lord Westbury in Caton v. Caton, L. R. 2 H. L., 142.
(*z*) Ogilvie v. Foljambe, 3 Mer., 53
(*a*) Propert v. Parker, 1 R. & My., 625. See, also, Western v. Russell, 3 V. & B., 187; Morison v. Turnour, 18 Ves., 175.
(*b*) Bleakley v. Smith, 11 Sim., 150.
(*c*) Barkworth v. Young, 4 Drew., 1.

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[1] *States in which the writing must be "subscribed" by the party to be charged.*] Alabama, Code of 1867, § 1862; California, Code, § 1624; Michigan, Comp. Laws 1871, ch 166, § 8; Minnesota, St. of 1873, vol. 1, pp. 691, 692, §§ 6, 12; New York, R. S. (6th ed.), vol. 3, pp. 141, 142; Oregon, Gen. Laws 1872, ch. 8, § 775; Wisconsin, St. of 1871, vol. 2, ch. 106, § 8. In New York, where the value of the property is more than fifty dollars, the agreement must be signed by both parties. Justice v. Long, 2 Rob., 333.

Who must sign the memorandum.] It depends entirely upon the language of the statute: where the same provides that it "shall be signed by the party to be charged," it is sufficient if the party or his authorized agent, against whom it is sought to be enforced, has signed it; but in those States where the writing is required to be "subscribed by the party or his agent making the lease or sale," it is indispensable that he should sign it. Hatton v. Gray, 5 Vin. Abr., 525; Buckhouse v. Crosby, 2 Eq. Cas. Abr., 32; Egerton v. Mathews, 6 East, 307; Allen v. Bennett, 3 Taunt., 169; Laythrope v. Bryant, 2 Bing. (N. C.), 735; Fararell v. Lowther, 18 Ill., 252; Ivory v. Murphy, 36 Mo., 534; Smith v. Fleck's App., 69 Pa. St., 474; Perkins v. Adsell, 50 Ill., 216; Estes v. Furlong, 59 id., 298; Barstow v. Gray, 3 Me., 409; Getchel v. Jewett, 4 id., 350; Morin v. Martz, 13 Minn., 198; Douglass v. Spears, 2 Nott & McCord, 207; Old Col. R. R. Co. v. Evens, 6 Gray, 25; Fenley v. Stewart, 5 Sandf., 401; Justice v. Lang, 42 N. Y., 493; S. C., 52 id., 323; Warrall v. Mann, 5 id., 229; Bleecker v. Franklin, 2 E. D. Smith, 393; Van Sault v. Edwards, 43 Cal., 458; Ruttenburgh v. Main, 47 id., 213; Lowry v. Mehaffy, 10 Watts, 387; Tripp v. Bishop, 56 Pa. St., 424; Slater v. Smith, 117 Mass., 96; Woodward v. Aspinwall, 3 Sandf., 272; McCrea v. Purmort, 16 Wend., 460; Sherley v. Sherley, 7 Blackf., 452; Cabott v. Cabott, 3 Pick., 83; Ives v. Hazard, 4 R. I., 14; Parish v. Koons, Parson's Sel. Eq. Cas., 76.

The word "signed," in the statute.] The English statute provides that the writing shall be "*signed.*" This language has been adopted by many of the States, viz.: Arkansas, St., ch. 73, § 1; Illinois, St. (ed of 1874), vol. 3, p. 210; Iowa, Code of 1873, § 3663; Kentucky, R. S., ch. 22, § 1; Massachusetts, R. S., ch 105, § 1; Missouri, St. of 1870, ch. 62, § 5; Nebraska, St. of 1873, ch. 25, § 5; New Hampshire, St. of 1867, ch. 201, § 12; New Jersey, Nixon's Dig. (4th ed.), p. 358, § 4; North Carolina, Code, ch. 50, § 11; Ohio, R. S. of 1870, ch. 47, § 5; Rhode Island, St. of 1872, ch. 193, § 8; Tennessee, St. of 1871,

§ **499**. The signature must be the actual writing of the name, or the doing of some act intended by the person to be equivalent to the actual signature of the name, such as a mark by a marksman. Therefore a letter beginning "My dear Robert," and concluding with the words "Do me the justice to believe me the most affectionate of mothers," was held not to be signed within the statute.(*d*)

§ **500**. A signature in pencil is not necessarily deliberative, and may be equally binding within the statute as one in ink.(*e*) And even a printed name may avail; so that where a vendor inserted in a printed invoice with his name on it the name of the purchaser, it was held that there was such a ratification and adoption of the printed name as made it a signature, and satisfied the statute.(*f*) In like manner a stamp may, no doubt, be used for the purpose of signing.(*g*) And the writing of the name of the sender of a telegram by the telegraph clerk, where the sender had himself signed the instructions for the message, has been held to be a good signature by an agent in that behalf.(*h*)[1] It seems, too, that the setting down of the initials may be a sufficient signature.(*i*)

§ **501**. It cannot be denied that there is some conflict of authority on the question, how far the writing of his name by the party must be with the intent of signing. There is

(*d*) Selby v. Selby, 3 Mer., 2.
(*e*) Lucas v. James, 7 Ha., 410, 419.
(*f*) Schneider v. Norris, 2 M. & S., 286; per Lord Eldon in Saunderson v. Jackson, 2 B & P., 239; Torret v. Cripps, 27 W. R., 706; 48 L. J. Ch., 567.
(*g*) Bennett v. Brumfitt, L. R. 3 C. P., 28. See, also, 1 Mad. Ch., 376, and the illustration there given from the stamping of Letters Patent by King William III.
(*h*) Goodwin v. Francis, L. R. 5 C. P., 295.
(*i*) See Phillimore v. Barry, 1 Ca., 513; Jacob v. Kirk, 2 Moo & R., 221; Sweet v. Lee, 3 Man & Gr., 452; cited St. Leon. Vend., 116.

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vol. 1, § 1758; Texas, Pash.'s Dig., p. , § 3875; Vermont, Stat. of 1870, ch. 66, § 1; Virginia, Code of 1849, ch. 143, § 1; West Virginia, Code, ch. 98, § 1. As to the *place of the signature*, it may be in any part of the writing. The name of the party must be so affixed as to authenticate the instrument; it must, however, be actually written, or something done equivalent thereto. Hawking v. Chase, 19 Pick., 502; McConnell v. Brillhart, 17 Ill., 354; Higdon v. Thomas, 1 Har. & Gill, 139; Anderson v. Harrold, 10 Ohio, 399; Wright v. King, Harring. (Mich.) St., 12; Wise v. Ray, 3 Green (Iowa), 430; Pennyman v. Hartsorn, 13 Mass., 87; Cabot v. Haskins, 3 Pick., 83.

The word "subscribed" in the statute.] In a State where the statute provides that the writing shall be "*subscribed*" by the party to be charged, in such case the name must be actually signed. There must be a manual subscription at the end of the writing. Davis v. Shields, 26 Wend., 341; rev'g S. C., 24 id., 322; James v. Patten, 6 N. Y., 9; rev'g S. C., 8 Barb., 344; DeBerski v. Paige, 47 id., 172; Vielie v. Osgood, 8 id., 130.

[1] See, also, Cabot v. Haskins, 3 Pick., 83; Cowrie v. Remfry, 10 Jur., 789.

authority for the proposition that such a writing, even with a different intent, may amount to a binding signature. "It has been decided," said Lord Eldon (then Lord Chief Justice of the Court of Common Pleas), "that if a man draw up an agreement in his own hand-writing, beginning, 'I, A. B., agree, etc.' and leave a place for a signature at the bottom, but never sign it, it may be considered as a note or memorandum in writing within the statute. And yet it is impossible not to see that the insertion of the name at the beginning was not intended to be a signature, and that the paper was meant to be incomplete until it was further signed;"(*j*) and in a subsequent case his lordship said: "It is true, that, where a party or principal, or person to be bound, signs as, what he cannot be, a witness, he cannot be understood to sign otherwise than as principal."(*k*) But in other cases the courts have had regard to the intention of the writing alleged to operate as a signature. The Court of Queen's Bench on this ground held that a person capable of being a witness, and signing as such, will not be bound by the instrument as a party, or as agent of a party;(*l*) and where the names were written at the beginning of a paper embodying a contract which concluded with the words "as witness our hands," and no signatures followed, it was considered by the court of common pleas not to satisfy the statute, because the concluding words evidently showed an intention that the paper should be signed at the foot.(*m*)

§ **502**. Some points, however, are clear. It is clear that the incidental introduction of his name by the party to be charged for some distinct and different purpose will not do: as where A. wrote on a memorandum for a lease the words "the rent to be paid to A.:" it was held to be no signature by him.(*n*)[1]

(*j*) In Saunderson v. Jackson, 2 B. & P., 239; referring apparently to Knight v. Cuckford, 1 Esp., 190 (Eyre, C. J.).

(*k*) Coles v. Trecothick, 9 Ves., 251. In Welford v. Beazeley (3 Atk., 503) it appears that the person who subscribed the articles as witness, and was held bound by the signature, was *not* a party to the articles.

(*l*) Gosbell v. Archer, 2 A. & E., 500, where the court doubted the above dictum of Lord Eldon in Coles v. Trecothick; but see the observations of Lord St. Leonards, Vend., 116.

(*m*) Hubert v. Treherne, 3 Man. & Gr., 743; S. C., s. n., Hubert v. Turner, 4 Scott (N. S.), 486. Cf Reg. v. Tart, 28 L. J. Q. B., 173.

(*n*) Stokes v. Moore, 1 Cox, 219; Hawkins v. Holmes, 1 P. Wms., 770.

[1] Geary v. Physic, 1 B. & Cr., 234; Draper v. Pattina, 2 Spears, 292; Merritt v. Clayson, 12 John., 102; McDowel v. Chambers, 1 Strobh's Eq., 347.

"I adhere," said Lord Selborne in the House of Lords,(*o*) "to what I said, when sitting in the court of chancery, in the case of Jervis v. Berridge,(*p*) that the Statute of Frauds 'is a weapon of defense, not offense,' and 'does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties.'"

§ **503**. The same principle was affirmed by the House of Lords in the case of Caton v. Caton,(*q*) where specific performance was sought of certain heads of arrangement set out in a written memorandum and there called "conditions as a basis for a marriage settlement mutually agreed upon in the event of marriage between the under-mentioned parties;" the parties so referred to being the plaintiff, then a widow, and the writer of the memorandum, who subsequently became her husband, and whose estate was sought to be charged. The document was not signed by the writer, but his name and initials appeared incidentally in several parts of it; and it was argued for the plaintiff that his name and initials, occurring as they did, below the words "undermentioned parties," were sufficiently connected with those words to enable the court to treat the document as a memorandum signed by him within the statute. The argument, however, was unsuccessful. "If," said Lord Westbury, in the course of his speech,(*r*) "a signature be found in an instrument incidentally only, or having relation and reference only to a portion of the instrument, the signature cannot have that legal effect and force which it must have in order to comply with the statute, and to give authenticity to the whole of the memorandum."

§ **504**. On the other hand, it seems that if there be an actual signature written with the intention of signing or authenticating the document, it is not the less operative because the signature was attached for a purpose different from that of satisfying the statute.(*s*) Thus, in a recent case in the Queen's Bench Division, the signature by the chairman of a board of directors in their minute book, pursuant to the 67th section of the companies act, 1862, of a resolution of the board to the effect that a particular draft

(*o*) In Hussey v. Horne-Payne, 4 App., 323.
(*p*) L. R. 8 Ch., 360.
(*q*) L. R. 2 H. L., 127.
(*r*) L. R. 2 H. L., 143.
(*s*) See, however, per Lord Selborne in Hussey v. Horne-Payne, 4 App. C., 323.

contract should be engrossed and executed, was held to operate as a sufficient signature within the statute, so as to bind the company to an admission of the contract, notwithstanding that the chairman's signature had been put to the minute merely in order to verify its accuracy and without any intention of attesting or verifying the contract.(*t*) "The question," said Lush, J., in delivering the judgment of the court, "is not what its [the minute's] object was, but whether it was a written and signed statement of the contract."(*u*)

§ **505**. But in another case, that of Eley v. The Positive Government Security Life Assurance Co.,(*v*) the question being whether a clause contained in the articles of association of a company, to the effect that a particular person should be the solicitor of the company, was a contract with this person, the judges of the exchequer Division held that if it was such a contract at all, the signature affixed to the articles having been affixed *alio intuitu* could not satisfy the statute. In the court above,(*w*) the case was disposed of irrespective of the statute, on the ground that the articles of association were a matter between the shareholders *inter se* or the shareholders and the directors, and did not create any contract between the solicitor and the company.

§ **506**. It is submitted that no writing of a name at the beginning, or end, or in the course of a paper, is a signature within the statute, unless the court conclude that it was there placed with the intention of authenticating the entire paper; but that if there be such a writing of a name, it is immaterial whether the signature was attached with the intention of evidencing the contract or for any other purpose whatever. All motives, objects and purposes beyond that of authenticating the paper are immaterial.(*x*)

§ **507**. Where the contract purports to be signed by an agent, it must be alleged and proved by the plaintiff that the person who signed as agent was authorized to act as agent for the purpose of concluding a binding contract of

(*t*) Jones v. Victoria Graving Dock Co., 2 Q. B. D., 314
(*u*) 2 Q. B. D., 324.
(*v*) 1 Ex. D., 20.
(*w*) 1 Ex. D., 88.
(*x*) See the judgments in Bailey v. Sweeting, 9 C. B. (N. S.), 843.

the nature of the contract set up.(*y*)[1] It is not enough in the case of a sale that the agent was appointed to negotiate for a sale: it is not enough that he was appointed as

(*y*) Blore v. Sutton, 3 Mer., 237; Ridgway v. Wharton, 3 De G. M. & G., 677; 6 H. L. C., 238; Firth v. Greenwood, 1 Jur. (N. S.), 806 (Wood, V. C.); Rice v. O'Connor, 12 Ir. Ch. R., 424; overruling S. C., 11 id., 510.

[1] *Agent's signature.*] The agent must be a third person to the agreement. One of the parties, even by consent, cannot act as the agent of the other. The same person can act as the agent of both parties. One partner can sign for the firm upon its business. Wright v. Dannah, 2 Comp., 203; Bailey v. Ogden, 3 John., 417; Lees v. Nuttall, 1 R. & M., 53; Lowther v. Lowther, 13 Ves., 103; Reed v. Norris, 2 M. & C., 374; Copeland v. Mer. Ins. Co., 6 Pick., 198; Reed v. Warner, 5 Paige's Ch., 650; Bartholomew v. Leach, 7 Watts, 472; N. Y. C. Ins. Co v. Nat'l Pas. Ins. Co., 20 Darb., 470; Hutton v. Williams, 35 Ala., 503; Tufts v. Plymouth Gold Mining Co., 14 Allen, 407; Chase v. City of Lowell, 7 Grey, 33; Johnson v. Trinity Church Soc, 11 Allen, 123; Kyle v. Roberts, 6 Leigh, 445.

Appointment of agent.] The agent must have full power, by signing on behalf of his principal, to bind him. Russell on Factors and Brokers, 75. This power must, however, be clearly evidenced. Roby v. Cossit, 78 Ill., 638. Unless the statute particularly directs that it shall be in some other manner, the appointment of an agent may be by parol. Weller v. Hendon, 5 Vin. Abr., 524, Pl., 45; Coles v. Trecothick, 9 Ves., 234, 250; Clinan v. Cooke, 1 Sch. & Lef., 22; Tolhott v. Bowen, 1 A. K. Marsh., 434; Merritt v. Clason, 12 John., 102; McWhorter v. McMahan, 10 Paige's Ch., 386; Irvin v. Thompson, 4 Bibb., 295; Shaw v. Nudd, 8 Pick., 9; Hawkins v. Chase, 19 id., 502; Mortimer v. Cornwell, 1 Hoffm. Ch., 351; McConnell v. Brilhart, 17 Ill., 354; Taylor v. Merrill, 55 Ill., 52; Dykers v. Townsend, 24 N. Y., 57; Moody v. Smith, 70 id., 598. The agent's authority must be in writing in the following States: California, Code, § 1741; Illinois, St. (ed. of 1874), vol. 3, p. 210, §§ 1, 2; Michigan, Com. Laws of 1871, vol. 2, p 1455, ch. 166, § 8; Nebraska, Gen. St., 1873, p. 392, ch. 25; see, also, Morgan v. Bergen, 3 Neb., 309; New Hampshire, Gen. St., 1867, ch. 201, § 12; Pennsylvania, Parrish v. Koons, Parson's Sel. Cas., 78; Horne v. Fricke, 6 Serg. & Rawle, 90; Twitchell v. Philadelphia, 33 Pa. St., 212; New York, McComb v. Wright, 4 Johns.'s Ch., 659. The agent's authority will be strictly construed. Bissell v. Terry, 69 Ill., 184.

Where the agent's act is sanctioned.] Best, J., said in Maclean v. Dunn, 4 Bing., 722, "It has been argued that the subsequent adoption of the contract by Dunn, will not take this case out of the operation of the Statute of Frauds; and it has been insisted that the agent should have his authority at the time the contract is entered into. If such had been the intention of the legislature, it would have been expressed more clearly. But the statute only requires some note or memorandum, in writing, to be signed by the party to be charged, or his agent thereto lawfully authorized, leaving us to the rules of the common law as to the mode in which the agent is to receive his authority. Now, in all other cases, a subsequent sanction is considered the same thing, in effect, as assent at the time, and, in my opinion, the subsequent sanction of a contract, signed by an agent, takes it out of the operation of the statute more satisfactorily than an authority given beforehand. Where the authority is given beforehand, the party must trust to his agent. If it be given subsequently to the contract, the party knows that all has been done according to his wishes" See, also, Ridgway v. Wharton, 3 De G. M. & G., 677; Clark v. Riemsdyk, 9 Cranch, 346; Lawrence v. Taylor, 5 Hill, 107.

The agent may sign in his own name.] The name of the principal need not appear. Yerby v. Grigsly, 9 Leigh, 387; Stackpole v. Arnold, 11 Mass., 27; Rice v. Gove, 22 Pick., 158; Minard v. Mead, 7 Wend., 68; Spencer v. Field, 10 id., 87; Pentz v. Stanton, id, 271, Ford v. Williams, 21 How, 287; Dykers v. Townsend, 24 N. Y., 57; Coleman v. First Nat. Bank, 53 id., 393; Eastern R. R. Co. v. Benedict, 5 Gray, 566; Walsh v. Barton, 24 Ohio St., 28; White v. Proctor, 4 Taunt., 209; Williams v. Bacon, 2 Gray, 387.

the person to whom intending purchasers were to apply to treat and see the property :(*z*) and further, it has been held that a written request by the owner of freeholds to procure a purchaser for them, and to advertise them at a certain price, is no authority to enter into an open contract of sale, and is probably no authority to contract for sale at all.(*a*)

§ **508**. As the statute does not require an agent for signing a contract to be appointed in writing, the general law applies in such cases, and consequently the appointment may be made as well by parol as by writing.(*b*)

§ **509**. The court may conclude in favor of the agency in any of the following ways :

(1) The court may come to this conclusion from direct evidence, oral or written, of the appointment ; or,

(2) By inference from the acts, letters or conduct of the parties, or from their relations to one another, or, in short, from any evidence legitimately raising the inference of agency.(*c*)[1]

(*z*) Godwin v. Brind, L. R. 5 C. P., 299 n.
(*a*) Hamer v. Sharp, L. R. 19 Eq., 108.
(*b*) Waller v Hendon, 5 Vin. Abr., 524, pl. 45; Coles v. Trecothick, 9 Ves., 234, 250; Clinan v. Cooke, 1 Sch. & Lef., 22; Emmerson v. Heelis, 2 Taunt , 38; per Tindal, C. J., in Acebal v. Levy, 10 Bing , 378; Heard v. Pilley, L. R. 4 Ch., 548; Cave v. Mackenzie, 46 L. J. Ch., 564.
(*c*) Dyas v. Cruise, 2 Jon. & L., 461; Sharp v. Milligan, 22 Beav., 606; Pole v Leask, 28 id., 562; affirmed in D. P., 33 L. J. Ch., 155; Rossiter v. Miller, 3 App. C., 1124

[1] This principle has been followed in numerous cases in this country. Yerley v. Grigsby, 9 Leigh, 387; Irvine v. Thompson, 4 Bibb., 295. And it has long been the law of England. In Coles v. Trecothick, 9 Ves., 250, Lord Eldon distinctly said that an agent need not be authorized in writing, in contracts relating to real estate. Words to the same effect are used in Clinan v. Cooke, 1 Sch. & Lefr., 31; and it can admit of little doubt, either at law or in equity. It seems clear that where a statute, such as the statute of frauds, requires the instrument to be in writing in order to bind the party, he may, without writing, authorize an agent to sign it in his behalf, unless the statute positively requires that the *authority* should be in writing. Story on Agency, § 50; 2 Kent (5th ed.), 613, 614; Chitty on Contracts (6th Am. ed.), 210, 211, note and cases cited. Shaw v. Nudd, 8 Pick., 9; Yerley v. Grigsby, 9 Leigh, 387; Turnbull v. Trout, 1 Hall, 336; Ewing v. Tees, 1 Binn., 450; Talbot v. Bowen, 1 Marsh. (Ky), 436; 1 Sug. Ven. and Purch (6th Am. ed.). 132, 186; Mortimer v. Cornwell, 1 Hoff. Ch., 351; Mortlock v. Buller, 10 Ves., 311; Johnson v. Dodge, 17 Ill., 433. In Worrall v. Dunn, 1 Seld., 229, it is decided by the Court of Appeals that, where an agent, authorized by parol to contract for his principal, executes an agreement, in the name of the principal, *under seal*, such agreement is binding on the principal as a simple contract. That a contract for the sale of lands need not be under seal, but merely in writing; and that the authority of the agent, to bind his principal, in case of this kind, may well be conferred by parol. And in McWhorter v. McMahan, 10 Paige, 386, a case decided by Walworth, Ch., it is said, "that it is only necessary that such agent be lawfully authorized to execute the contract; an authority in writing, for that purpose, is not required by the Statute of Frauds. An authority to *convey* lands is required by the statute to be in writing, but clearly not of an authority to *contract* to *convey*." Lawrence v. Taylor, 5 Hill, 107. But whether a contract signed by one partner, in behalf of himself and copartners, for the sale

(3) An alleged principal, though he may in fact have given no authority to the alleged agent, may by representations which he has made to the other party, or by inducing

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of real estate, can be enforced against the purchaser, under the Revised Statutes of New York, was thought in More v. Smedburgh, 8 Paige, 600, to be questionable. A reference to the statute, however, will show that the agreement or memorandum must be subscribed by the party by whom the sale is made; that in McWhorter v. McMahan—the property sold belonging to two partners—the chancellor was of opinion that the contract, to be valid, must be signed by both of them, or by one as agent. The rule in New York is laid down in the case of Worral v. Munn, 5 N. Y., 239, by Paige, J.: "It is a maxim of the common law," says the learned justice, "that an authority to execute a deed or instrument under seal, must be conferred by an instrument of equal dignity and solemnity; that is, by one under seal. This rule is purely technical. A disposition has been manifested by most of the American courts to relax its strictness, especially in its application to partnership and commercial transactions I think the doctrine, as it now exists, may be stated as follows, viz.: If a conveyance or any act is required to be by deed, the authority of the attorney or agent to execute it must be conferred by deed; but if the instrument or act would be effectual without a seal, the addition of a seal will not render an authority under seal necessary; and if executed under a parol authority, or subsequently ratified or adopted by parol, the instrument or act will be valid and binding on the principal. It is said that the rule as thus relaxed is confined in its application to transactions between partners. But it seems to me that a distinction between partners and other persons in the application of the rule, as relaxed and qualified by recent decisions, stands upon no solid foundation of reason or principle. The whole authority of a partner to act for his copartners, and to bind them and their interest in the copartnership property, is founded upon the common-law doctrine of agency. So far as he acts for his partners he is an agent." As to whether the signing of the name of the grantor to a deed, by a third person, in the presence, and by the express direction of such grantor, is a sufficient signature under the Statute of Frauds to convey land—a question which arose in Wallace v. McCullough, 1 Rich. Ch., 426—there have existed different opinions, giving rise to not a little perplexity. "This point," says Mr. Parsons, in a learned note on the subject, "upon which there seems to be no express decision, arose in the recent case of Wood v. Goodridge, 6 Cush., 117. This was the case of a mortgage deed and note made under a power of attorney under seal, by simply signing the name of the principal opposite to a seal, in the case of the deed, and, in the case of the note, by simply writing the principal's name at the foot. It was not necessary to decide the point, the court being of the opinion that the power, though very general in its terms, did not confer authority to mortgage, nor to borrow money and bind the principal by a promissory note. But the question of the manner of execution was much considered, and the court, per Fletcher, J., signified an inclination to hold, that where an attorney signs the name of his principal to an instrument which contains nothing to indicate that it is executed by attorney, and without adding his own signature as such, it is not a valid execution. In another case a deed was signed in the presence and by the direction of P. G. (and in the presence of an attesting witness) thus: "P. G. by M. G. G." It was objected that M. G. G., signing in that manner for the principal, should have had a power under seal; but the deed was held valid. Gardner v. Gardner, 5 Cush., 483. In delivering the judgment in this case, Shaw, C. J., said: "The name being written by another hand, in the presence of the grantor, and at her request, is her act. The disposing capacity, the act of mind, which are the essential and efficient ingredients of the deed, are hers; and she merely uses the hand of another, through incapacity or weakness, instead of her own, to do the physical act of making a written sign. Whereas, in executing a deed by attorney, the disposing power, though delegated, is with the attorney, and the deed takes effect from his act, and therefore the power is to be strictly examined and construed." Perhaps it will still be regarded as an open

him to lay out money on the faith of the alleged agency, be estopped from denying the agency.(*d*)

(4) Ratification may take the place of agency. Here the maxim applies, *omnis ratihabitio retrotrahitur et mandato æquiparatur*, and, therefore, the subsequent ratification of a contract, entered into by a person then unauthorized as agent, takes it out of the statute;(*e*) and this ratification need not be by any express act; it is enough if the party whose authority is required take the benefit of the contract, or even if, with a full knowledge of it, he passively acquiesce in it for a length of time longer than that reasonably to be allowed for the expression of dissent.(*f*) But it will not be implied from vague expressions to a third person.(*g*)[1]

(*d*) Ridgway v. Wharton, 6 H. L. C., 238, 297; per Lord Cranworth in Ramsden v. Dyson, L. R. 1 H. L., 158.

(*e*) Maclean v. Dunn, 4 Bing., 722; Ridgway v. Wharton, 6 H. L. C., 238, 296. See, too, Fitzmaurice v. Bayley, 6 El. & Bl., 868; 8 id., 664; 9 H. L. C., 78.

(*f*) Bigg v Strong, 3 Sm. & G., 592; aff'd 6 W. R., 536; Rice v. O'Connor, 12 Ir. Ch. R., 424, 434. And see per Lord Hatherley in Phillips v. Homfray, L. R. 6 Ch., 778

(*g*) Ridgway v. Wharton, 6 H. L. C., 238.

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question whether the simple signing of the principal's name, without evidence on the face of the instrument that the execution is by an agent, may not be sufficient. From a passage from Dixon on Title Deeds, vol. 2, p. 533, it may be inferred that the author's view is similar to that now taken by the supreme court of Massachusetts. On the other hand, the books contain numerous intimations that it has not generally been supposed heretofore that any other form is necessary to the valid execution of a deed by attorney than is requisite when the principal makes a deed in his proper person. See 1 Prest. Abstr. (2d ed.), 293, 294; Smith's Merc. Law, B. 1, ch. 5, § 4; Wilks v. Back, 2 East, 142. 145; Elliot v. Davis, 2 B. & P., 338; Bac. Abr. Leases, § 10; also Hansom v Rowe, 6 Fost., 327. It seems to be the better opinion, that ever since the Statute of Frauds, a signing is not essential to a deed. Aveline v. Whisson, 4 M. & Gr., 801; Cherry v. Henning, 4 Excheq., 631; Shepp. Touch. by Preston, 56, note. If this be so, it may be considered going very far, to hold that the addition of the name of the principal, by the hand of an authorized agent, invalidates an instrument which would have been perfectly good without any signature at all. In some States, indeed, the statutes of conveyances modify the common law in this particular, and require signing as well as the affixing of a seal."

[1] The case of Montacute v. Maxwell, 1 P. Wms., 618, is an important case on this subject. The plaintiff brought a bill against the defendant, her husband, setting forth that the defendant, before her intermarriage with him, promised that she could enjoy all her own estate to her separate use; that he had agreed to execute writings to that effect, and had instructed counsel to draw such writings, and that when they were to be married, the writings not being perfected, the defendant desired that this might not delay the match, because, his friends being there, it might shame him; but engaged that, upon his honor, she should have the same advantage of an agreement as if it were in writing, drawn in form, by counsel, and executed; whereupon the marriage took place. To this bill the defendant pleaded the statute of frauds. And the Lord Chancellor said: "In cases of fraud, equity should relieve, even against the words of the statute, as if one agreement in writing should be proposed and drawn, and another fraudulently and secretly brought in and executed in lieu of the former, in this or such like cases of fraud, equity would relieve; but where there is no fraud, only relying upon the honor, word or promise of the defendant, the statute making these promises void, equity will not interfere; nor were the in-

§ **510**. For a valid ratification it is necessary that the person who ratifies the contract should have been in existence at its date:(*h*) and further, that he should be the person in whose name the agent has professed to act.(*i*) Thus, where the pretended agent professed to contract in writing on behalf of a married woman, it was held that the husband could not ratify the contract, as he had not been named as a principal.(*j*)

§ **511**. It is now clearly decided that, at sales by auction, auctioneers are agents of the purchaser as well as of the vendor.(*k*) This conclusion seems to have been arrived at from the necessity of the case, and the peculiar nature of the mode of sale.(*l*) "The nature of the proceeding by auction," said Lord Langdale, M. R.,(*m*) "the bidding for the purpose of making the purchase, the necessity of making a statement of the bidding, the direction to the auctioneer to write down the bidding, which is perhaps involved in the very process of bidding, and some other circumstances afford intelligible ground for the decision in Emmerson v. Heelis,(*n*) and the approbation which has since been bestowed upon it." Where this necessity does not exist, as in a subsequent purchase in private from the auctioneer, no such agency arises.(*o*)[1] But where, after an unsuccessful

(*h*) Kelner v. Baxter, L. R. 2 C. P., 174; Scott v. Lord Ebury, id., 255; Melhado v. Porto Allegre Railway Co., L. R. 9 C. P., 503.

(*i*) Wilson v. Tumman, 6 Man. & Gr., 236; per Parke, J., in Vere v. Ashby, 10 B. & C., 298.

(*j*) Saunderson v. Griffiths, 5 B. & C., 909; and see Brook v. Hook, L. R. 6 Ex., 89.

(*k*) Emmerson v. Heelis, 2 Taunt., 38; White v. Proctor, 4 id., 209; Kemeys v. Proctor, 3 V. & B., 57; S. C., 1 J. & W., 350; Buckmaster v. Harrop, 7 Ves., 341; S. C., 13 id., 456; Kenworthy v. Schofield, 2 B. & C., 945; Edgell v. Day, L. R. 1 C. P., 80, 84; cf. Bartlett v. Purnell, 4 A. & E., 792.

(*l*) Gosbell v. Archer, 2 A. & E., 500; Earl of Glengal v. Barnard, 1 Ke., 788; affirmed in D. P. as Lord Glengal v. Thynne, St. Leon. Law of Prop., 56.

(*m*) In Earl of Glengal v. Barnard, 1 Ke., 788

(*n*) 2 Taunt., 38.

(*o*) Mews v. Carr, 1 H. & N., 484.

structions given to counsel, for the preparing of writings, material, since, after they were drawn and engrossed, the parties might refuse to execute them." But an entirely different view of a very similar case, and more in conformity with Dundass v. Dutens, was expressed, in this country, by Mr. Justice Story, in Jenkins v. Eldridge, 3 Story, 291. There, it was said that, where instructions are given and preparations made for marriage settlements, and the woman is persuaded by the man to marry, trusting to his verbal promise to complete them, equity ought to relieve and compel performance.

[1] And this note or entry on his account of sales, if the sale, the price, and the purchaser's name, are contained in it, is a sufficient note in writing of the agreement, signed by a person thereto authorized by the purchaser, within the meaning of the Statute of Frauds. Smith v. Jones, 7 Leigh, 165; Episcopal Church of Macon v. Wiley, 2 Hill. Ch., 584; M'Comb v. Wright, 4 John. Ch., 659. And signing by the purchaser, in person, at an auction sale, is not requisite. Bleecker v. Franklin, 2 E. D. Smith, 93. But to render an auctioneer's entry of sale at auction a compliance with the Statute of Frauds, he must be an

sale by auction, but before the auctioneer had left the rostrum, a purchaser ascertained from the auctioneer's clerk the amount of the reserved bidding, and agreed to take the property at that price, and signed a bidding paper for it, but subsequently denied the authority of the auctioneer to act as the vendors' agent, it was held impossible for him to contend that the sale ought not to be treated as one by auction.(*p*)[1]

(*p*) Else v. Barnard, 28 Beav., 228.

authorized public auctioneer. The validity of an entry in an auctioneer's book applies equally to sales of real estate and personal property. Anderson v. Chick, 1 Bailey's Ch., 118. Thus, in Bailey v. Leroy, 2 Edw. Ch., 514, a person purchased by parol, of the successful bidder at an auction sale of real estate, his right under the bid, the terms of which were evidenced by the auctioneer's certificate, and upon a bill by the assignee for a specific performance of the contract, a plea of the statute of frauds was overruled. In New York, the validity of auction sales is regulated by statute. And "whenever goods shall be sold at public auction, and the auctioneer shall, at the time of sale, enter, in a sale book, a memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person on whose account the sale is made, such memorandum shall be deemed a note of the contract of sale, within the meaning of the last section." Rev. Stat., pt. 2, ch. 9, tit. 2, § 4. The statute requiring that these contracts should be actually signed by the party to be charged therewith, or by his agent, a written memorandum of the terms of a sale made by a broker employed by both parties, although containing the names of both parties to the sale, in the body of the memorandum, was held to be insufficient under the statute. Dennison v. Carrahan, 1 E. D. Smith (N. Y.), 144. A commissioner appointed by the court is likewise the agent of both parties; and a memorandum made by him of the sale is a sufficient memorandum in writing. Jenkins v. Hogg, 2 Const Rep., 821. The same remark applies also to masters in chancery. Gordon v. Sims, 2 McCord, 154.

[1] *Public sale; signature by auctioneer.*] Story, J., in Smith v. Arnold, 5 Mason, 414, said: "It appears to me, speaking with all due respect, to have done much to destroy the salutary operation of the Statute of Frauds. By the common law, if an agent is to execute a deed for his principal, his authority must be of a high nature. It must be by deed. By analogy, it would have seemed convenient, if not indispensable, to have held that where the statute to prevent frauds and perjuries required a contract to be in writing, if executed by an agent his authority should be in writing also. That the auctioneer is agent of the seller is clear. That he is also the agent of the buyer is not very clear, and is a conclusion founded on somewhat artificial reasoning. But the doctrine is now established, and the best reason in support of it is, that he is deemed a disinterested person, having no motive to mistate the bargain, and enjoying equally the confidence of the parties." See, also, Macomb v. Wright, 4 John.'s Ch., 659; Hinds v. Whitehouse, 7 East, 558; Shansfield v. Johnson, 1 Esp., 101; Walker v. Constable, 1 Bos. & Bell, 306; Cordon v. Sims, 2 McCord's Ch., 164; Adams v. McMillin, 7 Portor, 73; Anderson v. Chick, Bailey's Eq., 118; Endicot v. Perry, 14 Sm. & Marsh., 157; White v. Crew, 16 Ga., 416; White v. Watkins, 23 Me., 423; Simon v. Motivos, 3 Burr., 1921; Gill v. Bicknell, 2 Cush., 358; Hart v. Woods, 7 Blackf., 568.

The memorandum made by the auctioneer must, in plain terms, refer to the conditions of the sale, and must state all the material terms of the agreement. Morton v. Dean, 13 Metc., 385; Kenworthy v. Schofield, 2 B. & C., 945; Nichols v. Johnson, 10 Conn., 192; Davis v. Shields, 26 Wend., 341; Meyer v. Adrian, 77 N. C., 83; Pinckney v. Hagadorn, 1 Duer, 89.

§ **512**. In order to prove that the auctioneer on a sale by auction was the vendor's agent, it is only necessary to prove by whose instructions he acted;(*q*) and it seems that after the hammer has fallen the vendor is not entitled to revoke the authority of the auctioneer, although, at the time when the vendor seeks to revoke it, no written contract has been signed.(*r*)

§ **513**. As an agent may not, without express authority, delegate his authority to another, an auctioneer cannot without permission appoint another to conduct the sale,(*s*) and, for the same reason, the clerks of agents are not agents for the principal, unless the principal has assented to their acting as such.(*t*) The auctioneer's clerk at an auction will be held to have been the purchaser's agent for the purpose of entering his name at the time of the sale in a book,(*u*) if it can be shown that the purchaser, by word, sign or otherwise, authorized the making of such entry: and even in the absence of any proof of such authority, there appears to be general custom investing the auctioneer's clerk with it.(*v*)[1]

§ **514**. In one case, a solicitor employed in a marriage-treaty, who drew up a minute of the arrangement came to at an interview, was held not to be an agent lawfully authorized to bind the parties, so as to make the insertion of their names in the minute a signature within the statute;(*w*) nor has a solicitor, instructed on behalf of one of the parties to prepare a formal contract, authority to act as his client's

(*q*) Consider Pike v. Wilson, 1 Jur. (N. S.), 59.

(*r*) Day v. Wells, 30 Beav., 220. See further, as to the auctioneer's authority, McMullen v. Helberg, I. R. 6 C. L., 465; Brett v. Clowser, 5 C. P. D., 386

(*s*) Dart, Vend. (5th ed.), 178.

(*t*) Coles v Trecothick, 9 Ves., 234. Cf. Bird v. Boulter, 4 B. & Ad., 443.

(*u*) As to what such entries must contain, see Rishton v. Whatmore, 8 Ch. D., 467; infra, § 525.

(*v*) Bird v. Boulter, 4 B. & Ad., 443; Pierce v. Corf, L. R. 9 Q. B , 210.

(*w*) Earl of Glengal v. Barnard, 1 Ke., 769; affirmed in D. P. as Lord Glengal v. Thynne, St. Leon. Law of Prop., 56. See, also, De Biel v. Thomson, 3 Beav , 469; Hammersley v. De Biel, 12 Cl. & Fin., 45.

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[1] An auctioneer's clerk may thus enter the names of the purchasers in a book, and it is immaterial whether he be appointed by the agent of the vendor or the auctioneer to make the sale. Smith v. Jones, 7 Leigh, 165.

Auctioneer's clerk, signature by.] An auctioneer's clerk cannot sign for his employer. This was held in a case where the clerk signed, not having specially obtained authority, and there was no proof of assent. Meadows v. Meadows, 3 McCord, 458; Enty v. Mills, 1 McMull., 453; Cristie v. Simpson, 1 Rich., 407; Carmack v. Masterson, 3 Stew. & Port., 411; Rice v. Durin, 56 Barb., 647. Where the auctioneer has made a proper entry on the day of sale, and the same has been adjourned, he need not repeat the entry on the adjourned day. Price v. Durrin, 56 Barb., 647.

agent for the purpose of signing any memorandum or note of the contract within the statute.(*x*)

§ **515**. A telegraph clerk despatching a message from written instructions of the party sought to be charged has been held the agent of such party for the purpose of signing his name in the telegraphic message.(*y*)

§ **516**. The authority of an agent may be revoked at any time before the authority is acted upon, and such revocation may be proved by parol.(*z*) But where the agent has been habitually employed in that capacity, and so held out by the principal, the latter will be bound by his acts if within the scope of his former authority, until reasonable notice has been given of its revocation.(*a*)

§ **517**. The death of the principal works an instant revocation of an agent's authority, and any contract made by the agent after, though without notice of the death, is void.(*b*)

§ **518**. The question of agency is one of fact, and comes accordingly under the rules now applicable to such questions.(*c*) In former times the court of chancery has directed an issue to try the question of agency.(*d*)[1]

§ **519**. It follows from what has already been said that letters passing between the parties themselves, or between the party sought to be charged and some third party, even including amongst such third parties the writer's own agent, may in many cases be used for the purpose of completing or supplying such evidence of the contract as the statute requires. It may be convenient to consider these cases under the following heads, viz.: (1) where there is an unsigned writing containing all the terms of the contract, and the letters are adduced as incorporating that writing, and furnish-

(*x*) Smith v. Webster, 3 Ch. D., 49. See, too, Forster v. Rowland, 7 H. & N., 103. Distinguish Jolliffe v. Blumberg, 18 W. R., 784.

(*y*) Godwin v. Francis, L. R. 5 C. P., 295.

(*z*) Vynior's Case, 8 Co., 82; Manser v. Back, 6 Ha., 443.

(*a*) Trueman v. Loder, 11 A. & E., 589; Ex parte Swan, 7 C. B. (N. S.), 400, 432 But an agent for sale of goods whose authority has been revoked cannot validly pledge the goods even to persons who have no notice or means of knowing of the revocation; see Fuentes v. Montis, L. R. 3 C. P., 268; S. C., L. R. 4 C. P., 93

(*b*) Watson v. King, 4 Camp., 272; Smout v. Ilbery, 10 M. & W., 1; Carr v. Livingston, 35 Beav., 41.

(*c*) See Ord. XXXVI, rr 3, 6, 26, 27.

(*d*) Howard v. Braithwaite, 1 V. & B., 202.

[1] An agreement may, of course, be signed by an agent; but, not only must such agent be authorized to complete the transaction, it must likewise be evident either that his general powers are amply sufficient, or that he was especially appointed to effect the contract in question; and where the manner of execution has been prescribed, he is as much incapacitated from deviating from the terms of his authority, as he is of transcending the limits assigned him. Fraser v. McPherson, 3 Dessau., 393; Mackay v. Moore, Dudley, 94.

ing the signature of one or both of the parties; (2) where the principal writing is incomplete in one or more of its terms, and the letters are referred to to supplement the defect; and (3) where they are adduced as themselves constituting the contract and the written evidence of it.[1]

§ **520**. (1) In order to make a contract binding under the Statute of Frauds, it is not necessary that it should be all contained in one paper, signed by the party to be charged; but the terms of the contract may be contained in one paper, and the signature may be found in some other paper, provided that such second paper refer to the paper which does contain the terms.(*e*)[2]

§ **521**. For the ascertainment and identification of the actual paper referred to, parol evidence is admissible:(*f*) for the one paper cannot be physically contained in the other paper. In the same way, in the case of a bequest in a will, the thing given and the person to whom it is given must be mentioned in the instrument, but the actual identification of the thing and the person must, from the nature of the case, be dehors the instrument, and, therefore, a matter of parol evidence.(*g*)[3]

(*e*) Allen v. Bennet, 3 Taunt., 169; Ridgway v. Wharton, 3 De G. M. & G., 677; S. C., 6 H. L. C., 238. See, also, per Lord Eldon in Coles v. Trecothick, 9 Ves., 250; Gaston v. Frankum, 2 De G. & Sm., 561; Powell v. Dillon, 2 Ball. & B., 416; Long v. Millar, 4 C. P. D., 450. Where the terms of the contract are contained in several documents, all must be produced. See Post v Marsh, 16 Ch. D, 395.

(*f*) Per Lord Redesdale in Clinan v. Cooke, 1 Sch. & Lef., 33.

(*g*) See supra, § 325.

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[1] Barry v. Coombe, 1 Pet., 640; Case v. Worthington, 1 Root, 172.

[2] Blair v. Snodgrass, 1 Sneed (Tenn.), 1; Tallman v. Franklin, 4 Kern. (N. Y.), 584.

[3] In Blair v. Snodgrass, 1 Sneed, 1, it is said that, while a contract for the sale of land may be perfectly valid, under the statute of frauds, in detached writings, that a specific performance will not be decreed, unless the papers can, by reference to each other, be connected without the introduction of parol evidence. It is plainly the law that the precise meaning of the parties must be clearly ascertained from the instrument themselves, to the exclusion of extrinsic evidence; and the decisions upon this point are substantially the same, both at law and in equity. Brettel v. Williams, 4 Excheq., 623; Saunderson v. Jackson, 2 B. & P., 238; Western v. Russell, 3 Ves. & B., 188; Forster v. Hale, 3 Sumn., 696; Allen v. Bennett, 3 Taunt., 169; Ide v. Stanborn, 15 Verm., 685; Toome v. Dauson, Cheves, 68; Parkhurst v. Van Cortland, 1 John.'s Ch., 273. Parol evidence is, however, admissible to identify a written contract. Farwell v. Lowther 18 Ill., 252

Parol promise for the benefit of one who is not a party to the agreement.] An action may be successfully maintained by a third person, one who is not a party to the contract, in a case where a parol promise has been made for his benefit, he having partly performed under it. Crocker v. Higgins, 7 Conn., 342.

Reformation of written instrument by parol.] Parol evidence may be given that a mistake has been made in a written agreement, and it may be rectified

§ 522. There must, however, be a reference: therefore, where the contract made no reference to an advertisement respecting the property which was sought to be introduced

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and specifically enforced. It must, however, be conclusively shown, that the instrument does not conform to the intention of the parties, and the proposed connection must be established by very conclusive proof. Philpot v. Eliott, 4 Md. Ch., 273; Hunt v. Rosnomer, 8 Wheat., 174; Tyson v. Passmore, 2 Pa. St., 122. An absolute deed may be shown to be, in fact, a mortgage. Taylor v. Luther, 2 Sumn , 228; Artz v. Grove, 21 Md., 456. "When it appears that the understanding, at the time of the verbal promise, was, by a writing, to comply with the provisions of the Statute of Frauds, it is something more than a mere verbal promise. The opposite party relies upon the special stipulation to reduce it to writing, and thus make him secure. A chancellor would decree its specific performance. If, in confidence that such writing will be executed, the legal title is acquired, it is a fraud in the purchaser to refuse to do what was promised, and claim to hold discharged of it, which will constitute him a trustee *ex maleficio*." Sharswood, J., in Wolford v. Herrington, 74 Pa. St., 311: Wells, J., in Glass v. Hulbert, 102 Mass., 24, holds in a case where "the proposed reformation of an instrument involves the specific enforcement of an oral agreement within the Statute of Frauds, or where the terms sought to be added would so modify the instrument as to make it operate to convey an interest or secure a right which can only be conveyed or secured through an instrument in writing, and for which no writing has ever existed, the Statute of Frauds is a sufficient answer to such a proceeding, unless the plea of the statute can be met by some ground of estoppel to deprive the party of the rights to set up the defense. The fact that the omission or defect in the writing, by reason of which it failed to convey the land, or express the obligation which it is sought to make it convey or express, was occasioned by mistake, or by deceit and fraud, will not alone constitute such an estoppel. There must occur, also, some change in the condition or position of the party seeking relief, by reason of being induced to enter upon the execution of the agreement, or to do acts upon the faith of it, as if it were executed with the knowledge and acquiescence of the other party, either express or implied, for which he would be left without redress if the agreement were to be defeated." See, also, Wilson v. Watts, 9 Md., 356; Heth v. Woodbridge, 6 Rand, 605; Chetwood v. Brittin, 1 Green's Ch., 438; Luckett v Williams, 37 Mo., 388; Espy v. Anderson, 14 Pa. St., 308; Markle v. Wehrheim, 32 Ill., 534. The respondent is entitled to more latitude in the introductions of parol proof to vary a written agreement, than is the petitioner. Quinn v. Roath, 37 Conn., 16. Where the parties agree, in the writing itself, that parol evidence may establish its terms, it is, of course admissible. Fowler v. Redicom, 52 Ill., 405

Rule where the property has been obtained by fraud.] "If the defendant entered into the arrangement with the premeditated design to mislead the confidence of the plaintiff, and of practicing upon his credulity and want of caution to get the title of the property into his own hands, and then convert it into the means of oppressively using it for his own benefit, the case would be out of the Statute of Frauds." Story, J., in Jenkins v. Eldridge, 2 Story, 181; see, also, Kinard v. Hierz, 3 Rich 's Eq., 423; Teague v. Fowler, 56 Ind., 569; McDonnald v. May, 1 Rich.'s Eq., 95; Schmidt v. Gatewood, 2 id., 162; Gill v. Bicknell, 2 Cush , 355; Willink v. Vanderveer, 1 Barb , 599.

No consideration for the parol agreement.] The Statute of Frauds always applies to a contract, in a case where the only defense is, that one party was guilty of a fraud in refusing to perform his part of the agreement; *e. g* , A and B. both being present at the sale, made a verbal arrangement to the effect that A. should bid off the estate in his own name, pay the vendor, and enter into a written contract for the purchase of the land; that the same should be conveyed to them as tenants in common, B. agreeing immediately to refund one-half of the price paid by A.; both parties mutually agreed to join in the mortgages required to be given; all of which was done. Held, "a party, in no legal

to supply a term, it was held that this could not be done:(*h*) and so also the mere admission in writing of a contract, without ascertaining its terms, is inoperative.(*i*)[1]

§ **523**. Further, the reference must be to terms in writing: therefore, where a writing duly signed referred not to a writing but to terms arranged by parol, there was no valid contract.(*j*) But the terms, if in fact in writing, need not appear on the face of the other paper to be so: so that a reference in one paper to "terms agreed on," when in fact the only terms agreed on were in writing, was held sufficient.(*k*)

§ **524**. Whether the reference must be express and on the face of the paper containing the signature, or whether it be enough that a jury or judge of fact would conclude from the circumstances and contents that the two papers are parts of one correspondence, may be open to doubt. The latter is probably the better view.

§ **525**. In a case arising on an entry of a contract in an auctioneer's book, where the entry contained no reference to the conditions, subject to which the sale took place, Hall, V. C., said that the entry must contain such a reference to the conditions as to identify them upon production as being the conditions mentioned in the entry.(*l*)

§ **526**. In Tawney v. Crowther,(*m*) the contract was reduced into writing, and was in possession of the defendant, who, in answer to a letter from the plaintiff's solicitor, asking him to meet him and sign the contract, wrote a letter, in

(*h*) Clinan v. Cooke, 1 Sch. & Lef., 22 Distinguish Nene Valley Drainage Commissioners v. Dunkley, 4 Ch. D., 1.
(*i*) Rose v. Cunynghame, 11 Ves., 550; Clerk v. Wright, 1 Atk., 12.
(*j*) Ridgway v. Wharton, 3 De G. M. & G., 677; S. C., 6 H. L. C., 238.
(*k*) Baumann v. James, L. R. 3 Ch., 508.
(*l*) Rishton v. Whatmore, 8 Ch. D., 467.
(*m*) 3 Bro. C. C., 161, 318.

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sense, commits a fraud by refusing to perform a contract void of its provisions. He has not, in that sense, made a contract, and has a perfect right both at law and in equity to refuse performance." Grover, J., in Levy v Brush, 45 N. Y., 597; see, also, Barnett v. Dougherty, 32 Pa. St., 371; Hogg v. Wilkins, 1 Grant (Pa.), 67; Patterson v. Horn, 1 id., 301; Campbell v. Campbell, 2 Jones' Eq., 364; Wallace v. Brown, 10 N. J. Eq., 308; Dodd v. Wakeman, 28 id., 484; Farnham v. Clements, 51 Me., 426; Wheeler v. Reynolds, 66 N. Y., 227; Walker v. Locke, 5 Cush., 90; Hickman v. Grimes, 1 A. K. Marsh, 86; Cooper v. Stevens, 1 John.'s Ch., 425.

[1] But it has been decided in Virginia, that a letter promising to convey a certain tract of land, "according to contract," is a sufficient memorandum under the Statute of Frauds, although the terms of the contract are not mentioned, if the party can prove the price to be given by one witness. Johnson v. Ronald, 4 Munf., 77. See McConnell v. Brillhart, 17 Ill., 354.

which he mentioned his having been from home, acknowledged having said his word should be as good as his bond, and that there was time enough before Michaelmas to settle everything; and again said "that his word should always be as good as any security he could give." Lord Thurlow, first on a plea of the statute, and subsequently on the answer, which insisted on the statute, held that the letters and the paper together constituted a valid contract. "If a letter cannot be referred to the agreement," said his lordship, "or does not contain proper terms, I cannot treat it as out of the statute; but I confess, on what appears here, the papers do refer to that agreement, and contain a promise to perform it; the defendant did intend by the letter to raise a confidence that the agreement should be performed.(*n*) Lord Redesdale has expressed his disapprobation of this case, considering that the promise was intended to be of an honorary and not of a legal and binding nature;(*o*) and the correctness of the decision has been questioned by Lords Cranworth and Brougham in the case of Ridgway v. Wharton.(*p*) From the note at the end of the case in Brown's Reports (*q*) it appears that the decree was by consent.

§ **527**. In another case, the defendants' letters referred distinctly to the conditions of sale which were in their hands, signed by the plaintiff, and the Court of Queens Bench held that no parol evidence was necessary to connect the two, and that there was a binding contract.(*r*) And where A. wrote to B., proposing to let a public house on certain terms, and B.'s clerk met A. and discussed the terms of the lease, and afterwards B. replied that he was willing to take the premises of A., this was held to refer to the terms contained in A.'s letter, and, therefore, to constitute a contract.(*s*)

§ **528**. (2) Letters may be used to supply a term wanting in the principal writing: thus where, in a memorandum, the lessor's name was not mentioned, and subsequently a letter from the lessee, referring to this document, mentioned his (the lessor's) name in a manner from which the court

(*n*) 3 Bro. C. C., 320.
(*o*) See Belt's n, 3 Bro. C. C., 153.
(*p*) 6 H. L. C., 265, 271. See per Lord St. Leonards, S. C., 293.
(*q*) 3 Bro. C. C. (Belt's ed.), 320.
(*r*) Dobell v. Hutchinson, 3 A. & E., 355. See, also, Saunderson v. Jackson, 2 B. & P., 238, and Jackson v. Lowe, 1 Bing., 9
(*s*) Wood v. Scarth, 2 K. & J., 33. See, too, Morris v. Wilson, 5 Jur. (N. S.), 168.

could imply that he was lessor, there was held to be sufficient evidence of the contract.(*t*) But where (*u*) two persons came to a verbal agreement for the sale and purchase of an estate, and the vendor thereupon signed and handed to the purchaser a memorandum of the particulars of the property and the price, which, however, did not contain the purchaser's name; and afterwards the vendor signed and sent to the purchaser a letter, saying, "I am about to relet the land at S. The Lady Day rents will be mine and the Michaelmas yours." It was held that the defect in the memorandum was not supplied by the letter.

§ **329**. (3) Letters may themselves constitute the contract and the written evidence of it: and the cases in which a contract is thus constituted by correspondence between the parties are very numerous: many of them have been already discussed.(*v*)[2]

§ **330**. It is one of the first principles of a case of this kind that where the contract, or the note or memorandum of the terms of the contract, has to be found in letters, the whole of the correspondence which has passed must be taken into account.(*w*) Accordingly, in a case where the first two letters of a correspondence, taken by themselves, appeared to amount to a complete contract, but there really were other terms, which when those letters were written were unsettled and in the result remained unsettled, the House of Lords held that there was no concluded contract.(*x*) The plaintiff cannot insist on some terms or some letters and reject others. If the letters, taken as a whole, do not constitute the contract, the plaintiff must fail.(*y*)

§ **331**. The contract may even be sufficiently evidenced by a letter addressed to a third person, provided it ascertain the terms of the contract.(*z*)

§ **332**. It is desirable to consider the effect of letters

(*t*) Warner v. Willington, 3 Drew., 523. See this case infra, § 533.

(*u*) Skelton v. Cole, 1 De G. & J., 587.

(*v*) See supra, § 273 et seq. See, also, Western v. Russell, 3 Y. & B., 187; Coupland v. Arrowsmith, 18 L. T. (N. S.), 755; Rossiter v. Miller, 5 Ch. D., 648; 3 App. C., 1124; Bonnewell v. Jenkins, 8 Ch. D., 70.

(*w*) Per Lord Cairns in Hussey v. Horne-Payne, 4 App. C., 316.

(*x*) Hussey v. Horne-Payne, 4 App. C., 311.

(*y*) Nesham v. Selby, L. R. 13 Eq., 191; aff'd L. R. 7 Ch., 416.

(*z*) Per Lord Hardwicke in Welford v. Beazely, 3 Atk., 503; Child v. Comber, 3 Sw., 423 n.; Seagood v. Meale, Prec. Ch., 560. See, also, Barkworth v. Young, 4 Drew., 1, particularly 13.

[2] Neufville v. Stuart, 1 Hill. Ch., 159.

which repudiate or disown a contract referred to in them. Where the letters deny that a contract ever existed, it would seem impossible to treat them as the evidence or an admission of a contract, but where the letters repudiate on the ground of matter subsequent, as for example, of damage done to the goods bought, there a statement of the terms of the contract in the letters may satisfy the statute.(*a*)

§ **533**. The subject was discussed in the case of Warner v. Willington,(*b*) before Kindersley, V. C. In that case there was a memorandum for a lease, signed by the defendant, the proposed lessee, but deficient in the lessor's name, and then a letter by the defendant, withdrawing the memorandum, but referring to the lessor's name: and the Vice-Chancellor held that the letter supplied the original defect in the memorandum, and converted it into a contract binding under the statute. It is submitted that this decision is not without difficulties on principle; for it would seem that the whole letter must be looked at, and then that affirms the memorandum to be, what in fact without the letter it was, namely, a mere offer: and, further, the case appears difficult to reconcile with other decisions. Thus, where buyers have written letters distinctly referring to invoices of the goods, but insisting that they were not bound to accept the goods, and thus repudiating the contract, the courts have held that there is no sufficient writing within the 17th section of the Statute of Frauds:(*c*) and in a case in the exchequer, in which Warner v. Willington was cited, the court considered that it would be treating the Statute of Frauds as nothing, if a letter, merely declining to accept goods under a parol contract or an insufficient written contract, were held to take the case out of the statute.(*d*) And again, in a case in chancery, Turner, L. J., treated the argument that a letter declining to enter into a contract could constitute one as too strained to require any observation.(*e*)

§ **534**. It is now distinctly settled, after some difference of opinion, that a written memorandum of contract after

(*a*) Bailey v. Sweeting, 9 C. B. (N. S.), 843; Nesham v. Selby, L. R. 13 Eq., 191; 7 Ch., 406; cf. Jackson v. Oglander, 13 W. R., 936.

(*b*) 3 Drew., 523.

(*c*) Cooper v. Smith, 15 East, 103; Richards v. Porter, 6 B. & C., 437; per Lord Denman in Dobell v. Hutchinson, 3 A. & E., 371; Gosbell v. Archer, 2 id., 500.

(*d*) Goodman v. Griffiths, 1 H. & N., 574.

(*e*) Wood v. Midgley, 5 De G. M. & G., 41, 46.

marriage, in pursuance of a parol one before, takes the case out of the statute.(*f*)[1]

§ **535**. With regard to the mode in which a contract within the statute should be pleaded, the rules of court under the judicature act have swept away the diversity which existed in the pleadings at common law and in chancery. Before these acts, it was enough at law to allege a contract, on the ground that "with respect to acts valid at common law, but regulated as to the mode of performance by statute, it is sufficient to use such certainty of allegation as was sufficient before the statute:"(*g*) whereas in chancery it was not enough to allege a contract without stating that it was in writing, on the ground that a parol contract was a contract, though not an enforceable one; and a bill merely alleging a contract was, therefore, open to demurrer.(*h*)[2]

§ **536**. Now, as we have seen, one uniform mode of plead-

(*f*) Taylor v. Beech, 1 Ves. Sen, 297; per Lord Cottenham in Hammersley v. De Biel, 12 Cl. & Fin, 64 n; per Turner, L. J., in Surcome v. Pinniger, 3 De G. M. & G., 571; Barkworth v. Young, 4 Drew., 1. See, also, Hodgson v. Hutchenson, 5 Vin. Abr., 522, pl. 34. In Randall v. Morgan (12 Ves., 67), Grant, M. R., expressed doubts on this point.

(*g*) Steph. Plead., 401 (4th ed.).

(*h*) Barkworth v. Young, 4 Drew., 1; and see per Lord Thurlow in Whitchurch v. Bevis, 2 Bro. C. C., 559; per Grant, M. R., in Spurrier v. Fitzgerald, 6 Ves., 555.

[1] Wood v. Savage, Walk. Ch., 471; see Livingston v. Livingston, 2 John.'s Ch., 537, decided by Kent, Ch.; Argenbright v. Campbell, 3 Hen. & M., 144.

[2] See Bean v. Valle, 2 Mis., 126. But a different rule is laid down, at law, in Stern v. Drinker, 2 E. D. Smith, 401. In that case, which came before the court on appeal, the plaintiff's complaint alleged that he recovered a judgment against one Nusbaun for $45; that he issued an execution thereon, and levied on sufficient property of the defendant to satisfy the judgment; that the defendant agreed with him, that if the plaintiff would release and abandon the levy, and deliver the property to the debtor, he, the defendant, would pay the plaintiff the amount of the said judgment; that the plaintiff did abandon such levy, and therefore claimed to recover from the defendant the amount of the judgment. But the complainant did *not* state that this promise was in writing. Woodruff, J., in delivering his opinion, said, * * * "this is the first instance within my observation, in which judgment was ever ordered for a defendant, upon a demurrer to a declaration, because the promise declared upon was not *averred to be in writing*. It is not necessary, in declaring upon a promise (although it be confessedly within the statute, and if not in writing, void), to *aver* that it was written. It is sufficient for the plaintiff if it appear *in evidence* on the trial in writing. And for the well-settled reason that the statute introduces a new rule of evidence only, and not a new rule of *pleading*. And this rule is applicable to all contracts within the statute. Whether the evidence will support the claim, is a question which does not arise upon the *pleading*, but upon the trial of an issue thereon. For it is only necessary in pleading to state the legal effect, to wit, *the promise*. And if it appears on the trial that the defendant made *no binding promise*, then in judgment of law he made *no* promise." In support of this position, were cited Roberts on Frauds, 156, 202; Buller's N. P., 279; 3 Burr., 1890; 1 Saund. R., 276, note 2, to Duffe v. Mayo; Case v. Barber, 3 Raym., 451; Birch v. Bellamy, 12 Mod., 540; Hutchinson v. Hewson, 7 T. R. 350, n.; 3 id., 159; Read v. Brookman, by Lord Kenyan, 2 Chit. Pl., 121, n. s.; 123, n. x.: 2 Saund. Pl. and Ev., 546; see, also, on this point, the case of Miller v. Upton, 6 Ind., 53.

ing prevails in all the divisions of the high court: and now an allegation of a contract is sufficient without stating it to be in writing, and the defendant who admits the contract in fact, but denies its sufficiency with regard to the statute, must specially raise the point by his defense.(*i*)[1]

§ **537**. Another important provision of the rules is to the effect that where a contract does not arise from an express agreement, but is to be implied from a series of letters or conversations or otherwise from a number of circumstances, it is sufficient in pleading to allege such contract as a fact, and to refer generally to such letters, conversations, or circumstances without setting them out in detail; and that if in such a case the person so pleading desires to rely in the alternative upon more contracts than one, as to be implied from such circumstances, he may state the same in the alternative.(*j*)

3. *What takes a contract out of the statute.*

§ **538**. Courts of equity hold that, notwithstanding the express language of the statute, a case may be taken out of its operation by any one of the following circumstances: (1) by the sale being by the court; (2) by an admission in the defense of a contract in fact, where the defense does not insist on the statute; (3) by fraud,(*k*) and (4) by a parol contract and part performance, which is, as we shall see, but a particular case of fraud. In the two first cases the reason is, that the danger of that which the statute was meant to guard against does not arise, and in the third and fourth that the statute shall not be made use of to cover a fraud.

§ **539**. (1) It was held that a sale in the court of chancery by private contract, in pursuance of an order confirming a

(*i*) Ord. XIX, r 23. Cf. as to the distinctness now required in pleadings, Byrd v. Nunn, 7 Ch D., 284; and see supra, § 485.

(*j*) Ord. XIX, r. 27.

(*k*) See, too, infra, § 782 (mistake).

[1] *The statute of frauds is no defense* where the contract is admitted, and the defendant fails to plead the statute. Morse v. Merest, 6 Mad., 26; Ridgway v. Whorton, 3 De G. M. & G., 677; Lincoln v. Wright, 4 id., 1; Jenkins v. Eldridge, 3 Story, 181; Willink v. Vanderveer, 1 Barb., 599; Trapnall v. Brown, 19 Ark., 39; Shield v. Tramell, id., 51; *contra*, Box v. Starford, 13 Smed. & Marsh., 93; see, also, Glass v. Hulbert, 102 Mass., 38.

master's report,[1] was exempted from the Statute of Frauds, and consequently might be enforced against the representative of a purchaser who had not signed it.(*l*) The considerations upon which this decision was based are that the judicial character of the proceeding is such as to prevent the hazard of uncertainty and perjury which the statute was intended to prevent, and moreover that, in such a case, the purchaser having been a party to the proceedings in which the order for sale to him was made, is bound by the order, and would be guilty of contempt in refusing to pay the purchase money.

§ **540**. The same rule was held to apply to sales in the ordinary way by auction before a master,(*m*) and would no doubt apply to sales under the present practice ;(*n*) but not to ordinary sales by public auction, because, it is said, such sales might be without written or printed particulars and conditions, and also, no doubt, because they are in no way proceedings connected with the court.(*o*)

§ **541**. (2) An admission of a parol contract in the answer of a defendant to the bill of complaint was, under the old practice, held to take the case out of the statute where the answer did not insist upon the statute, and this because the admission took the case out of the mischief which the statute was designed to remedy.(*p*)[2] Another reason suggested for the rule was that the contract, though originally in parol, was, after admission, evidenced by writing under the signature of the party, which would be a sufficient compliance with the statute as interpreted by the decided cases.(*q*)

(*l*) Att.-Gen. v. Day, 1 Ves. Sen., 218; per Grant, M. R., in Blagden v. Bradbear, 12 Ves., 472; per Lord Cottenham in Ex parte Cutts, 3 Deac., 267; Lord v. Lord, 1 Sim., 503.

(*m*) Att.-Gen. v. Day, ubi supra.

(*n*) See St. Leon. Vend., 86; Dart, Vend., 197 (5th ed.).

(*o*) Blagden v. Bradbear, 12 Ves., 466, 472. See, too, Mason v. Armitage, 13 id., 35.

(*p*) Gunter v. Halsey, Ambl., 586; Limondson v. Sweed, Gilb., 35. See, also, per Lord Rosslyn in Rendeau v. Wyatt, 2 H. Bl., 68.

(*q*) Story, Eq. Jur., § 755.

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[1] See the cases of Gordon v. Sims, 2 McCord's Ch., 151, and of Jenkins v. Hogg, 2 Const. Rep., 821. Cases of this class are there rather considered to rest upon the same basis as ordinary auction sales—*i. e.*, the fact that the master or commissioner is essentially the agent of both parties—than treated as exceptions because of their legal nature.

[2] Woods v. Delle, 11 Ohio, 455. But the doctrine is firmly established that, even where the answer confesses the parol agreement, if it insists, by way of defense, upon the protection of the statute, the defense must prevail as a competent bar. Story's Eq. Pl., § 763; Thompson v. Todd, 1 Pet. C. C., 388;

§ 542. The substantial result of the present system of pleading is to continue this effect of an admission of the contract in fact, and furthermore to treat the contract as admitted unless it is actually denied. For it results from the rules of court,(*r*) that if the contract be not expressly denied to exist in fact, and expressly stated not to satisfy the Statute of Frauds, it will be held that the defendant has admitted both its existence and its sufficiency to satisfy the statute.

§ 543. In the case of the death before judgment of the person making such an admission, his representatives will be bound by his admission on being made parties to the action in the manner provided by the rules.(*s*) But the admission by a vendor that he had contracted to sell an estate to a person since deceased will not bind the personal representatives of such deceased purchaser; nor will an admission by a purchaser that he had contracted to buy an estate bind the real representatives of the alleged vendor; for it is now clearly settled that, in order to entitle the real or personal representative to enforce the execution of a contract to the prejudice of the other, there must have been, at the death of the deceased contractor, a contract by which he was legally bound, and which the court would have compelled him specifically to execute; and it is consequently open to any of the parties interested, notwithstanding the admissions or submissions of any of the other parties, to take every objection which the deceased might himself have taken if living.(*t*) Thus the admission of a contract by the executors of a testator, will not bind the residuary legatee.(*u*)

§ 544. (3) The principle upon which the court regards fraud as forming an exception to the statute was stated by Lord Eldon as follows: "Upon the Statute of Frauds, though declaring that interests shall not be bound except

(*r*) Ord. XIX, rr. 17, 20, 23.
(*s*) Att. Gen. v. Day, 1 Ves. Sen., 218, 221; Ord. L., rr. 2, 4, 5.
(*t*) Buckmaster v. Harrop, 7 Ves., 341; S. C., 13 id., 456. See Earl of Radnor v. Shafto, 11 id., 448, overruling Lacon v. Mertins, 3 Atk., 1; see, also, Potter v. Potter, 1 Ves. Sen., 437.
(*u*) Buckmaster v. Harrop, 7 Ves., 341; S. C., 13 id., 456.

Stearns v. Hubbard, 8 Greenl., 320; Harris v. Knickerbacker, 5 Wend., 638; 1 Sug. Vend. & Purch. (6 Am. ed.), 137; Whitbread v. Brockhurst, 1 Bro. C. C. (Am. ed., 1844), 407 (note 3); Whitchurch v. Bevis, 2 id., 569 (note i); Moore v. Edwards, 4 Ves., 23 (note a).

by writing, cases in this court are perfectly familiar deciding that a fraudulent use shall not be made of that statute; where this court has interfered against a party meaning to make it an instrument of fraud, and said he should not take advantage of his own fraud even though the statute has declared that, in case those circumstances do not exist, the instrument shall be absolutely void.[1] One instance is the

[1] *Fraud on the part of the defendant.*] "The rule that fraud takes the case out of the statute is too well-settled to admit of doubt; and for the purpose of showing that fraud has been committed, or is being attempted, parol evidence has always been held to be admissible. The difficulty has been in determining what amounted to fraud in the particular case; and to this difficulty is referable those conflicts of opinion which seem occasionally to have trenched upon the rule itself. The rule, however, is universally acknowledged, and there is no case, in which the conduct of the defendant was held to be fraudulent, that he has been allowed to shelter himself behind the statute." Cope, J., in Hidden v. Jordan, 21 Cal., 92; see, also, Fannin v. McMullin, 2 Abb. Pr. (N. S.), 224; Ryan v. Dox, 34 N. Y., 307; S. C., 36 id., 511; Nelson v. Worrall, 20 Iowa, 469.

Statute of Frauds, no defense for fraud.] "We recognize the doctrine, then, that a court of equity will not permit the Statute of Frauds to be set up as a defense by a party infected with fraud, and that parol trusts of real estate may be established in direct contradiction to the statute on the ground of fraud; and that whenever a case of fraud is made out by the bill, parol evidence will be received for the purpose of sustaining the case, even though the effect of such evidence be to alter or vary a written instrument, and though the benefit of the statute be insisted upon by the defendant." Miller v Cotten, 5 Ga., 346. See, however, Woodward, J., in McCulloch v. Cowher, 5 Watts & Serg., 427, where he says, "unless there be something in the transaction more than is implied from the violation of a parol agreement, equity will not decree the purchaser to be a trustee. And the distinction is indispensable, otherwise there would be a repeal of the statute, under the pretense of preventing fraud, by decreeing an express trust, which would be introductive of the very evils the statute was designed to prevent."

Parol trust in fraud of creditors.] A parol trust cannot be set up, where the effect or design is to delay, hinder or defraud creditors. Murphy v. Hubert, 16 Pa. St., 50; S. C., 7 id., 420; Hills v. Elliott, 12 Mass., 26.

Fraud at public sale.] "It is not now an open question that, when a party agrees before the sale to purchase property about to be sold, under an execution against a party, and to give such party the benefit of the purchase, the agreement is binding, and will be enforced. The defendant, upon the faith of such agreement, may have ceased his efforts to raise the money for the purpose of paying off the execution, and thus preventing a sale of his property. It will not do to say that the party promising was moved merely by friendly or benevolent considerations, and may, therefor, at his option, decline a compliance with his agreement. Such considerations constitute the foundation of almost every trust, and the trustee should be held to account, as nearly as possible, in the same spirit in which he originally contracted. But it is said that the agreement, if in fact made, was void under the Statute of Frauds. The statute has reference alone to a sale of lands, and not to a contract to purchase of one person for the benefit of another." *Per curiam* in Soggins v. Heard, 31 Miss., 428; see, also, Walker v. Hill, 21 N. J. Eq., 191; Sandfoss v. Jones, 35 Cal., 481. "Can it be tolerated that a creditor shall, at a sale of his debtor's property, lull him to sleep, and keep off other purchasers by an agreement under which he buys in the land for a small sum much below its value, and then that he shall declare that the agreement was void under the Statute of Frauds, and that the other party should have no benefit from the agreement, whilst he reaped

case of instruction upon a treaty of marriage; the conveyance being absolute, but subject to an agreement for a defeasance, which, though not appearing by the contents of the conveyance, can be proved *aliunde*—and there are many other instances."(*v*)

§ **545**. Thus, if it can be shown that the written contract which is sought to be enforced was only signed in consequence of some collateral contract having been come to, the plaintiff must either submit to the collateral contract or have his action for specific performance dismissed; and this, although the collateral contract is not evidenced in writing. Thus, in Clarke v. Grant,(*w*) where trustees of a charity sought specific performance of a written contract to take a lease, and the main defense was a parol contract of the same date as the written one and affecting the parcels, Grant, M. R., held that evidence to prove the parol contract was admissible, and that, if it were proved, it would be against equity and a fraud on the defendant to insist upon his performance of a contract, which he had only signed on the faith of an alteration being made in one of its terms.

§ **546**. In the last-mentioned case the defendant set up the collateral contract; but the cases go much further, and show that the plaintiff may, on the ground of fraud, obtain the benefit of a collateral parol promise which the person who claims under the written contract fraudulently refuses to recognize. In one case Lord Thurlow allowed the plaintiff to give parol evidence that, at the time the contract

(*v*) Mestaer v. Gillespie, 11 Ves., 627. (*w*) 14 Ves., 519, 525.

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all the fruits? Surely not. Courts of justice would be blind, indeed, if they could permit such a state of things."

Fraud must be at the time of the sale.] In Wheeler v. Reynolds, 66 N. Y., 227, it was held that where fraud was relied upon in a purchaser at a sheriff's sale, to make such purchaser a trustee *ex maleficio*, that it must be found at the time of the sale.

Mortgage property fraudulently purchased.] "But even in this class of cases, so important it is to maintain the utmost confidence in the efficiency of judicial sales, the purchaser should be protected against all pretenses of a trust by parol, unless his *mala fides* be proved by the clearest and most complete evidence. But where such demonstrative proof exists, and where the contract between the defendant in execution, and the purchaser, is not of such a character as to affect injuriously the rights of creditors, a court of equity will frustrate the contemplatable fraud by enforcing the contract specifically between the parties." Beasley, C. J., in Merritt v. Brown, 21 N. J. Eq., 401; see, also, Green v. Ball, 4 Bush, 586; Combs v. Little, 3 Green's Ch., 310; Marlatt v. Warwick, 18 N. J. Eq., 108; S. C., 19 id., 439; Rose v. Bates, 12 Mo., 30.

(which was subsequently reduced to writing) was entered into, an undertaking had been given by the assignee of the lease to the assignor for indemnity against the rents and covenants; his lordship laying down that, "where the objection is taken before the party execute the agreement, and the other side promise to ratify it, it is to be considered a fraud on the party if such promise is not kept.(*x*)

§ **547**. So, in the case of transactions which are really for mortgages or charges, if the written instrument be in terms absolute and have been obtained on a promise to execute a defeasance, or if the clause for redemption have been fraudulently omitted, the mortgagor or chargor has been allowed to come to the court and to reduce the absolute conveyance to a mortgage or charge.(*y*)

§ **548**. So, again, in Jervis v. Berridge,(*z*) where the plaintiffs assigned the benefit of a contract to the defendant upon certain terms, some only of which were reduced into writing, it was held that, under the circumstances of the case, the memorandum was only ancillary to the verbal contract, and any use of it by the defendant for a purpose inconsistent with the verbal contract was fraudulent. Lord Selborne, in the course of his judgment,(*a*) stated the principle now in discussion in words which have already been quoted.(*b*)

§ **549**. So, again, if A. have in his hands money of B., and at B.'s request lay it out in the purchase of an estate, A. cannot, on the ground that the land is conveyed to him, claim the estate as his own, and exclude parol evidence that he was a trustee for B.(*c*)[1]

(*x*) Pember v. Mathers, 1 Bro. C. C., 52. Cf. Snelling v. Thomas, L. R. 17 Eq., 303, where the plaintiff failed to establish the collateral contract alleged by him.

(*y*) 1 Eq. Ca. Abr., 20, pl. 5; Walker v. Walker, 2 Atk., 98; England v. Codrington, 1 Eden, 169; Williams v. Owen, 5 My. & Cr., 303, 306; Lincoln v. Wright, 4 De G. & J., 16; Douglas v. Culverwell, 3 Giff., 251; S. C., 4 De G. F. & J., 20.

(*z*) L. R. 8 Ch., 351.

(*a*) L. R. 8 Ch., 360. In his speech in the House of Lords, in Hussey v. Horne-Payne, 4 App. C., 323, Lord Selborne expressly reaffirmed the doctrine laid down in the quotation referred to in the text.

(*b*) Supra, § 502.

(*c*) Per Kindersley, V. C., in Lincoln v. Wright, 28 L. J. Ch., 707 n.; S. C., on appeal, 4 De G. & J., 16. See Ryall v. Ryall, 1 Atk., 59; Willis v. Willis, 2 id., 71; per Grant, M. R., in Lench v. Lench, 10 Ves., 517.

[1] *Implied trusts are not those to which the Statute of Frauds refers.*] Bigelow, J., in Stone v. Hackett (12 Gray, 227), says: "It is certainly true that a court of equity will lend no assistance toward perfecting a voluntary contract or agreement for the creation of a trust, nor regard it as binding, so long as it remains executory. But it is equally true that if such an agreement or contract be executed by a conveyance of property in trust, so that nothing remains to be done by the grantor or donor to complete the transfer of title, the relations of trustee and *cestui que trust* is deemed to be established, and the equitable rights and interests arising out of the conveyance, though made without consideration,

§ **550**. In all these cases, to exclude parol evidence and to adjudge specific performance of the contract as evidenced by the writing alone, would be to work the very mischief which the statute was intended to prevent, viz., to fix the party sought to be charged with a contract which he never, in fact, entered into.[1]

§ **551**. So, again, the want of writing could not be set up successfully by a man who had fraudulently prevented the writing from coming into existence.(*c*) Thus, where the defendant, on a treaty for the marriage of his daughter with the plaintiff, signed a paper comprising the terms of the agreement arrived at, but afterwards, and with a view to rid himself of the obligation imposed by it, induced his daughter to wheedle the plaintiff to give up the writing and then to marry her—the plaintiff was held entitled to relief and obtained a decree on the ground of fraud.(*d*)

§ **552**. But this want of writing must be due to fraud, and not to mere non-performance of a contract to sign a writing. No doubt the opposite view was formerly taken, and it was thought that an allegation that it was part of the parol contract between the contracting parties that the contract should be reduced into writing, would take the case out of the statute, on the ground of fraud. Accordingly, where a bill containing such an allegation was met by a plea of the statute, Lord North, after argument, ordered

(*c*) Maxwell v. Lady Montacute, Prec. Ch., 526; 1 Eq. Ca. Ab., 19; Whitchurch v. Bevis, 2 Bro. C. C., 565; cf. Wood v. Midgley, 2 Sm. & G., 115; reversed 5 De G. M. & G., 41; and see Story, Eq. Juris., § 768 (10th ed.)

(*d*) Mullet v. Halfpenny, cited in Peachey on Settlements, 82.

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will be enforced in chancery." See, also, Kekewich v. Manning, 1 De G. M. & G., 176; Jones v. Lock, L. R. 1 Ch., 25; Wason v. Colburn, 99 Mass., 342; Traphagen v. Best, 67 N. Y., 30; Chesler v. Dickerson, 54 id., 1.

Parol evidence.] Where a trust has resulted by implication of law, parol evidence may be relied upon to establish the collateral fact from which a trust may legally result. Church v. Sterling, 16 Conn., 388.

Equity enforces a parol trust where a fraud has been perpetrated, in order that it may be relieved, by raising an implied trust. It treats the party perpetrating the fraud as a trustee because he is *ex maleficio* because of the fraud. Wheeler v. Reynolds, 66 N. Y., 227; see, also, Hodges v. Howard, 5 R. I., 149; Cannon v. Ward, 8 Ga., 245; Jones v. McDougall, 32 Miss., 179; Hidden v. Jordan, 21 Cal., 92; Cole v. Cole, 41 Md., 301; Wilton v Harwood, 23 Me., 131; McBurney v Wellman, 42 Barb., 390; Martin v. Martin, 16 B. Mon., 8; Blodgett v. Hildreth, 103 Mass., 484.

[1] An agreement need only be signed by the party to be charged. Hatton v. Gray, 2 Ch. Cas., 164; Seton v. Slade, 7 Ves., 265; Fowler v. Freeman, 9 id., 351; Martin v. Mitchell, 2 Sac. & M., 426; Schneider v. Norris, 2 M. & S., 286; Shirley v. Shirley, 7 Blackf., 452; Rogers v. Saunders, 16 Me., 92; Ives v. Hazard, 4 R. I., 14; Anderson v. Harold, 10 Ohio, 399; Wright v. King, Harring. Ch., 12.

the defendant to answer so much of the bill only as charged that the contract was to be put into writing.(*e*) It seems obvious, however, that such a procedure affords a most easy means of evading the intention of the statute, and introducing the mischief it was designed to remedy: and accordingly, the law is clearly established, that such an allegation does not withdraw the case from the operation of the statute, and that, after a parol contract, a refusal to sign a written one is no fraud of which the court can take cognizance.(*f*)

§ **553**. The same principle as regards fraud was once considered to apply to marriage contracts, which also are within the fourth section of the statute. In Dundas v. Dutens,(*g*) Lord Thurlow decided that a post-nuptial settlement recited to be made in pursuance of an ante-nuptial parol control was not a voluntary settlement, and that because a refusal to perform the previous contract would have been a fraud; but this decision is in effect overruled by the case of Warden v. Jones,(*h*) where Lord Cranworth remarked that, were the decision in Dundas v. Dutens correct, the whole policy of the statute would be defeated.(*i*)[1]

(*e*) Leake v. Morris, 1 Dick., 14; S. C., s. n., Leake v. Morrice, 2 Cas. in Ch., 135; Hollis v. Whiteing, 1 Vern., 151; Deane v. Izard, 1 id., 159.

(*f*) Whitchurch v. Bevis, 2 Bro. C. C., 565; Wood v. Midgley, 5 De G. M. & G., 41; reversing S. C., 2 Sm. & Gif., 115.

(*g*) 1 Ves. Jun., 196; S. C., 2 Cox, 235. See, too, Viscountess Montacute v. Maxwell, 1 P. Wms., 620.

(*h*) 2 De G. & J., 76, 85.

(*i*) Cf. Trowell v. Shenton, 8 Ch. D., 324, where, however, the question turned on Lord Tenterden's Act.

[1] The case of Montacute v. Maxwell (1 P. Wms., 618), is an important case on this subject. The plaintiff brought a bill against the defendant, her husband, setting forth that the defendant, before her intermarriage with him, promised that she could enjoy all her own estate to her separate use; that he had agreed to execute writings to that effect, and had instructed counsel to draw such writings, and that when they were to be married, the writings not being perfected, the defendant desired that this might not delay the match, because, his friends being there, it might shame him; but engaged that, upon his honor, she should have the same advantage of an agreement as if it were in writing, drawn in form, by counsel, and executed: whereupon the marriage took place. To this bill the defendant pleaded the Statute of Frauds. And the Lord Chancellor said: "In cases of fraud, equity should relieve, even against the words of the statute, as if one agreement in writing should be proposed and drawn, and another fraudulently and secretly brought in and executed in lieu of the former, in this or such like cases of fraud, equity would relieve; but where there is no fraud, only relying upon the honor, word or promise of the defendant, the statute making these promises void, equity will not interfere; nor were the instructions given to counsel, for the preparing of writings, material, since after they were drawn and engrossed, the parties might refuse to execute them." But an entirely different view of a very similar case, and more in conformity with Dundas v. Dutens, was expressed, in this country, by Mr. Justice Story, in Jenkins v. Eldridge, 3 Story, 291. There, it was said that, where instructions are given and preparations made for marriage settlements, and the woman is persuaded by the man to marry, trusting to his verbal promise to complete them, equity ought to relieve and compel performance.

§ **554**. In cases of wills obtained by a promise to dispose of the property in a particular way, the court will, notwithstanding the language of the Statute of Frauds that every will must be in writing, and the language of the wills act to the same effect, give effect to the verbal arrangement by raising a trust on the property devised or bequeathed by the will.(*j*)

§ **555**. (4) The part performance of a contract by one of the parties to it may, in the contemplation of equity, preclude the other party from setting up the Statute of Frauds, and thus render it, although merely resting in parol, capable of being enforced by way of specific performance.[1]

(*j*) Podmore v. Gunning, 7 Sim., 644; Chester v. Urwick (No. 3), 23 Beav., 407; McGormick v. Grogan, L. R. 4 H. L., 82.

[1] That a part performance will take a case out of the Statute of Frauds, is a position supported by authorities too numerous and too overpowering to admit of its being treated as an open question. Annan v. Merritt, 13 Conn., 478. But in Tennessee, it is expressly decided that part performance will not take a parol contract, for the sale of lands, out of the statute. Patton v. McClure, 1 Mart. & Yerg., 333. As to the good policy of admitting exceptions, such as part performance, to the provisions of the Statute of Frauds, see Story's Eq Jur., § 765, and note 1.

Part performance.] "Nothing in this title contained shall be construed to abridge the powers of courts of equity to compel the specific performance of agreements in cases of part performance of such agreements." This is the language of the statute in Michigan, Com. Laws of Mich., 1871, vol. 2, p. 1455, ch. 166, § 8; Minnesota, Stat. of Minn., 1873, vol. 1, p. 692, § 13; Nebraska, Stat. of Neb., 1873, ch. 25, § 6; New York, Rev. Stat. of N. Y. (6th ed.), vol. 3, p. 341, § 10; and Wisconsin, Stat. of Wis., 1871, vol. 2, ch. 106, § 10. This has long been the settled rule in England. Lister v. Foxcraft, Gibb. Eq. Rep., 4; O'Herliky v. Hedges, 1 Sch. & Lef., 123; Bond v. Hopkins, id., 433; Warden v. Jones, 23 Beav., 487; Kelley v. Webster, 10 Eng. L. & Eq., 517. No verbal contract for the sale of lands, or any interest in the same, except leases for one year or less, can be sustained in Alabama, "unless the purchase money, or a portion thereof, is paid, and the purchaser be put in possession of the land of the seller." Code, 1867, p. 411, § 1862. Any parol agreement to be valid in California for the sale, or any interest in land, except leases for one year, must have been in part performed by the party seeking to enforce it, and such part performance must have been accepted by the other. Code, § 1741. The statute does not apply in Iowa, "where the purchase money, or any part thereof, has been received by the vendor, or where the vendee, with the actual or implied consent of the vendor, has taken and held possession under and by virtue of the contract." Code, 1873, § 3663. An instructive case on the question of part performance of contracts in relation to real property, as well as a summary of the cases, will be found in Wright v. Pucket, 2 Gratt., 370. The English and New York rule has been adopted in several of the States. Downey v. Hotchkiss, 2 Day, 225; Wilde v. Fox, 1 Rand., 165; Johnson v. Johnson, 6 id., 370; Ash v. Doggy, 6 Ind., 259; Hoen v. Simmons, 1 Cal., 119; Arguello v. Edinger, 10 id., 150; Kidder v. Barr, 35 N. H., 235; Hawkins v. Hunt, 14 Ill., 42; Gilmore v. Johnson, 14 Ga., 683; Johnson v. Hubbell, 10 N. J. Eq., 332; Eyre v. Eyre, 19 id., 102. In Pennsylvania, the agreement is not avoided by the statute, its effects are merely restrained. Tripp v. Bishop, 56 Pa. St., 424.

Part performance no defense in the following States.] Maine, "it appears to have been the intention not to authorize, under any circumstances, a decree for the specific performance of a contract not made in writing." Shepley, J., in

§ **556**. This exception is based on a principle of common fairness, on the view that it is unjust in a man who has made a bargain with another, to allow that other to act upon it, and then to set up the want of a formality as a bar to its complete performance by himself. The principle is the same as that which gave rise to the real contract in Roman law, that being a contract in which the connection between the parties was clothed with obligation, and so ceased to be *nudum pactum*, by force of the actual delivery of the subject of the

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Wilton v. Harwood, 23 Me., 131. Massachusetts, Buck v. Dowley, 16 Gray, 555; Abell v. Calderwood, 4 Cal., 90; Patterson v. Graton, 47 Me., 308; Skipwitt v. Dodd, 24 Mass., 487; Mississippi, Box v. Stamford, 13 Sm. & Marsh., 93; Beaman v. Buck, 9 id., 207; Hariston v. Jandon, 42 Miss., 380; North Carolina, Ellis v. Ellis, 1 Dev. Eq., 345; Barnes v. Teague, 1 Jones' Eq., 277. Under a prayer for general relief equity will, however, decree an accounting. Baker v. Parson, 1 Dev. & Batt. Eq., 281; Alhea v. Griffin, 2 id., 9; Lane v. Neilson, 1 Jones' Eq., 339; Tennessee, Ridley v. McNairey, 2 Humph., 174. On the general question of part performance, see Allen v. Chambers, 4 Ired. Eq., 125; Lucket v. Williamson, 37 Mo., 388; Brooks v. Wheelock, 11 Pick., 439; Jacobs v. Peterborough R. R. Co., 8 Cush., 223; Hunt v. Roberts, 40 Me., 187. "If judges who allowed themselves originally to be seduced from it by the hardship of particular cases had never swerved the statute itself, and the necessity of adhering to its provisions, would have become so well known that many of those distressing cases arising from parol contracts never would have occurred, and at all times, as well now as soon after enacting the law, there would have been less hardship and injustice if its provision had been strictly followed." Coulter, J., in Fry v. Shipler, 7 Pa. St., 91.

Part performance not recognized at law.] The doctrine of part performance is entirely confined to equity courts; at law, in order that a case may be taken out of the operation of the Statute of Frauds, there must be complete performance by one of the parties to the contract. Lane v. Shackelford, 5 N. H., 130; Patterson v. Cunningham, 12 Me., 506; Norton v. Preston, 15 id., 14; Allen v. Booker, 2 Stew., 21; Johnson v. Hanson, 6 Ala., 351; Payson v. West, Walker, Miss., 515; Thompson v. Gould, 20 Pick., 134; Adams v. Townsend, 1 Met., 483; Seymour v. Davis, 2 Sandf., 239; Duncan v. Blair, 5 Denio, 196; Thomas v. Dickinson, 14 Barb., 90; Eaton v. Whittaker, 18 Conn., 22; Sailor v. Gambriel, Smith (Ind.), 82. An instructive case on this question is Squire v. Whipple, 1 Vt., 73.

Reason for permitting part performance to operate.] "If, therefore, it be clearly shown what the agreement was, and that it has been partly performed, that is, that an act has been done, not a mere voluntary act or merely introductory or ancillary to the agreement, but a part execution of the agreement, and which would not have been done unless on account of the agreement—an act, in short, unequivocally referring to, and resulting from, the agreement, and such that the party would suffer an injury amounting to fraud by the refusal to execute that agreement, in such case the agreement will be decreed to be specifically performed." Maddock's Ch. Pr., vol. 1, p. 301; see, also, Buckmaster v. Hanop, 7 Ves., 346; Mundy v. Jolliffe, 5 My. & Cr., 177; Meach v. Stone, 1 D. Chip. (Vt.), 182; Heth v. Wooldridge, 6 Rand. 605; Hamilton v. Jones, 3 Gill. & Johns., 127; Merethen v. Andrews, 44 Barb., 200; Netherby v. Rip'ey, 21 Tex., 434; Mason v. Blair, 33 Ill., 194; Nye v. Taggart, 40 Vt., 295; Glass v. Hulbert, 102 Mass., 35; Bremer v. Bremer, 19 Ala., 481; Farrar v. Patton, 20 Mo., 81; Dickerson v. Cheisman, 28 Me., 134; Hare v. Goodrich 33 N. H., 32; Weber v. Marshall, 19 Cal., 447; Moore v. Small, 19 Pa. St., 461; Pond v. McWhorter, 50 Tex., 562; Williams v. Morris, 5 Otto, 457; Evans v. Lee, 12 Nev., 393; Ryan v. Dox, 34 N. Y., 307.

contract. "In the real contract," says Sir Henry Maine, "performance on one side is allowed to impose a legal duty on the other, evidently on ethical grounds."(*k*)

§ **557**. In order thus to withdraw a contract from the operation of the statute, several circumstances must concur: 1st, the acts of part performance must be such as not only to be referable to a contract such as that alleged, but to be referable to no other title: 2ndly, they must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing: 3rdly, the contract to which

(*k*) Ancient Law (6th ed), 332. See, also, page 338.

What must be shown, in order that part performance may take agreement out of the operation of the statute.] Where part performance is relied upon, it must be something performed with the actual or constructive knowledge and assent of the other party. It must directly refer to the agreement, and be a partial execution of it; and the party who seeks to complete the same must be damaged, if it is not enforced. Anderson v. Chick, 1 Bailey's Eq., 118; Smith v Smith, 1 Rich.'s Eq., 130; Hatcher v. Hatcher, 1 McMull.'s Eq., 311; Woolf v. Frost, 4 Sandf.'s Ch., 72; Eckert v. Eckert, 3 Prim. & Watts, 332; Dale v. Hamilton, 5 Hare, 381; Buckmaster v. Hanop, 13 Ves., 456; Lacon v. Meetins, 3 Atk., 1; Powell v. Lovegrove, 8 De G. M. & G., 357; Eaton v. Whittaker, 18 Conn., 222; Kidder v. Barr, 35 N. H., 235; Moale v. Buchannan, 11 Gill. & John., 344; Morphett v. Jones, 1 Swanst., 172; Peckham v. Barker, 8 R. I., 17; Richmond v. Foote, 8 Lans., 244; Hedrick v. Hern, 4 W. Va., 620; Welsh v. Bayard, 21 N. J. Eq., 186; Lester v. Kinne, 37 Conn., 9; Billingslea v. Ward, 33 Md , 48; Wright v. Puckett, 22 Gratt , 370; Davenport v. Mason, 15 Mass., 84; Stoddart v. Luck, 4 Md. Ch., 475; Semmes v. Worthington, 38 Md., 289.

Part performance must have sole relation to the agreement.] In order that a parol contract for the sale of land may be removed from the operation of the Statute of Frauds, the evidence must establish the following facts: The boundaries of the land and its quality; the amount of consideration must be fixed; possession must be taken under the agreement soon after it was made; change of possession must be continuous, notorious and exclusive, and the part performance must be such that he cannot be reasonably compensated in damages. Hart v. Carroll, 85 Pa. St., 508. The acts of part performance which will be sufficient to prevent the operation of the statute must be certain, and refer to an agreement of which they form a part, and which they partially execute; they must have no other end in view than the contract in question. Wheeler v. Reynolds, 66 N. Y., 227; Thyne v. Lord Glengall, 6 H. of L., 158; Rathbun v. Rathbun, 6 Barb., 98; Mundorff v. Howard, 4 Md., 459; Aday v. Echols, 18 Ala., 353; Whitridge v. Parkhurst, 20 Md , 62; Brema v. Wilson, 17 N. J. Eq., 180; Smith v. Crandall, 20 Md., 482; Bunton v. Smith, 40 N. H., 352; Charpiot v. Sigerson, 25 Mo., 63; Wallace v. Brown, 10 N J. Eq., 308; Cole v. Potts, id., 67; Williamson v. Williamson, 4 Iowa, 279; Eyre v. Eyre, 19 N. J. Eq., 102; Petrick v. Petrick, 19 id., 339; Goodhue v. Barnwell, Rice's Eq., 198; Owings v. Baldwin, 8 Gill., 337; Carlisle v. Flemming, 1 Harring. (Del.), 421.

The question of assent should be carefully considered.] A contract cannot be predicated upon a chance or loose conversation, notwithstanding the parties may seem to have come to an agreement The question of assent should be carefully considered as it is important; all the attendant circumstances should be weighed as well. The following instruction was held sound, and sustained. "If the jury believe that all the terms of the contract were not finally arranged the first day, but that the entire contract was to be arranged and reduced to writing the next day, there was no binding contract between the parties unless a contract was proved to have been made on the next day, or on some subsequent day." *Per curiam*, Brown v. Finney, 53 Pa. St., 373.

they refer must be such as in its own nature is enforceable by the court: and 4thly, there must be proper parol evidence of the contract which is let in by the acts of part performance.

§ 558. First, then, it seems evident that all that can be gathered from acts of part performance is the existence of some contract in pursuance of which they are done, and the general character of the contract: they cannot, unless possibly in some very singular case, be themselves sufficient evidence of the particular contract alleged, because they cannot in themselves show all the terms of the contract from which they flow. They may be evidence of an unknown contract, but the making known what that contract is, must be the result of the evidence which the acts in question are allowed to introduce.(*l*) It cannot be denied that there is some want of exactitude in the statements sometimes made in this respect, as, for instance, where it is said that the acts must be referable to the alleged contract; and Lord Redesdale seems to have held that, to admit parol evidence, the part performance must be such as to show the very same contract as the plaintiff alleged. So, that in a case where the plaintiff stated a parol contract for a lease for three lives, and payment of rent in part performance, and the defendant admitted a contract, but for one life and not for three, his lordship said that the Statute of Frauds put it out of the power of the court to execute the contract for the lease for three lives, the part performance being perfectly consistent with the contract alleged by the defendant, and that, therefore, there was no case to admit proof of a further contract.(*m*)

§ 559. The true principle, however, of the operation of acts of part performance seems only to require that the acts in question be such as must be referred to some contract, and may be referred to the alleged one; that they prove the existence of some contract, and are consistent with the contract alleged. This is very well illustrated by a case in the common pleas on the 17th section of the Statute of Frauds, by which acceptance is treated as such an act of part performance as dispenses with the necessity of

(*l*) See per Lord Alvanley, M. R., in Forster v. Hale, 3 Ves., 712; per Wigram, V. C., in Dale v. Hamilton, 5 Ha., 381.

(*m*) Lindsay v. Lynch, 2 Sch. & Lef., 1, 8. See infra, § 613.

writing.(*n*) It was there held that bare acceptance of the goods by the vendee was sufficient to satisfy that section of the statute, so that, although the vendee, immediately after accepting them, stated that he did so on terms different from those on which the vendor delivered them, yet the acceptance having established the fact of a contract of sale, parol evidence of its terms was admissible. It was there strongly urged that the acceptance must be equivalent to a memorandum in writing, and must show all the terms of the contract; but the doctrine was denied by the learned judges, both during the argument and by their decision of the case. Williams, J., in the course of his judgment, said, "The legislature has thought that where there is a fact so consistent with the existence of a contract of sale as the actual acceptance of part of the goods sold, the necessity of a written evidence of the contract might safely be dispensed with. But it is clear that it was not meant to go to all the terms of the contract; and that acceptance is no evidence of the price, but only establishes the broad fact of the relation of vendor and vendee. So, where there is proof of part performance, the jury must settle all the other facts that go to make up the contract."(*o*)

§ **560.** In like manner Mr. Austin, in one of his Fragments, has called attention to the "distinction between such solemnities of a contract as are merely evidence of *a* contract, and such as are evidence of *a* contract and of its *terms*." "Earnest, for instance," he adds, "is merely evidence that a contract was made: its subject, its terms, etc., must be established by evidence *aliunde*."(*p*)

§ **561.** To make the acts of part performance effective to take the contract out of the Statute of Frauds, they must be consistent with the contract alleged and also such as cannot be referred to any other title than a contract, nor have been done with any other view or design than to perform a contract;(*q*) therefore, if a tenant in possession sue for the specific performance of an alleged contract for a new lease, the mere fact of his continuance in possession will have no weight as an act of part performance of the contract, being

(*n*) Tomkinson v. Staight, 17 C. B., 697.
(*o*) 17 C. B., 707.
(*p*) Lectures (3d ed.), 940.
(*q*) Gunter v. Halsey, Ambl., 586. Consider Price v. Salusbury, 32 Beav., 446.

referable to his character as tenant.(*r*) Where a tenant under a term alleged the rebuilding of a party-wall, which was in a ruinous state during his term, as part performance of a contract by his landlord to grant a renewed term: it was held that the act was equivocal, as it might have been done by him in respect of his new title under the old as well as under the alleged new term.(*s*)[1] The cases in which possession is an act of part performance will be considered presently.(*t*)

§ **562**. Secondly, the principle upon which the court exercises jurisdiction in adjudging specific performance of parol contracts followed by part performance, is the fraud and injustice which would result from allowing the party charged to refuse to perform his part, after performance by the other upon the faith of the contract and with the knowledge of the party charged:(*u*) and this principle extends not only to contract which, but for such part performance, would be void by reason of the Statute of Frauds, but also to such as, being entered into by corporations, are invalid for want of their corporate seal.(*v*)

§ **563**. "Courts of equity," said Lord Cottenham,(*w*)

(*r*) Wills v Stradling, 3 Ves., 378 See, too, per Lord Eldon in Ex parte Hooper, 19 id., 479; per Plumer, M. R., in Morphett v. Jones, 1 Sw., 181; 5 Vin. Abr., 323, pl. 41; Phillips v. Alderton, 24 W. R., 8; and Brennan v. Bolton, 2 Dr. & War., 349.

(*s*) Frame v. Dawson, 14 Ves., 386.

(*t*) Infra, § 576 et seq

(*u*) Per Grant, M. R., in Buckmaster v. Harrop, 7 Ves., 346.

(*v*) See infra, § 622, and Steevens' Hospital v. Dyas, 15 Ir. Ch. R., 405, 421.

(*w*) In Mundy v. Jolliffe, 5 My. Cr., 177.

[1] In Crocker v. Higgins (7 Conn., 342), it is decided that an agreement within the Statute of Frauds, carried into execution on one part by acts performed with a *view to the agreement claimed*, is thereby taken out of the statute, and may be proved by parol evidence. It was held, in Harris v. Knickerbacker (5 Wend., 638), that an act alleged as part performance must be such as would not have been done, except on the contract. In Carlysle v. Fleming (1 Harring. Ch., 421), it is said that the acts alleged must appear unequivocally to have been done in pursuance of the contract. Ellis v. Ellis (1 Dev. Ch., 18[illegible]), is almost a repetition of the words used in Gunter v. Halsey, cited in the text. In that case it is said, that an act under a parol contract must be of such a nature, in order to take a case out of the statute, as a part performance, it could not have been done, except with reference to the contract. In Anderson v. Chick (1 Bailey's Ch., 118), it is said that the act claimed as part performance must have been, and intended to have been, done in pursuance of the contract. In order to show part performance of a contract to convey land, the claimant's possession must be referable to the agreement to convey. Jervis v. Smith, 1 Hoff. Ch., 470. To take a case out of the statute, on the ground of part performance, it is held, in Philips v. Thompson (1 John. Ch., 131), that the contract must be clearly proved, and the act must be in part performance of that particular contract. Lord v. Underdunk (1 Sandf. Ch., 46), is precisely a parallel case with Jervis v. Smith, already cited. See Smith v. Underdunk, 1 Sandf. Ch., 579; Byrne v. Romaine, 2 Edw. Ch., 445; Casler v. Thompson, 3 Green's Ch., 59; McMurtrie v. Bennett, Harring. Ch., 124; Hatcher v Hatcher, 1 McMullan's Ch., 311.

"exercise their jurisdiction, in decreeing specific performance of verbal agreements, where there has been part performance, for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the Statute of Frauds, after the other party to the contract has, upon the faith of such engagement, expended his money or otherwise acted in execution of the agreement. Under such circumstances, the court will struggle to prevent such injustice from being effected; and, with that object, it has, at the hearing, when the plaintiff has failed to establish the precise terms of the agreement, endeavored to collect, if it can, what the terms of it really were."

§ **564**. Such being the principle on which the court acts, it follows that, wherever the acts of the party to be charged have caused no change of circumstances in the other party,(*x*) and wherever the acts of part performance by the one are not such as to render refusal by the other party to perform the contract a fraud in him, however clearly they may evidence the existence of a contract, there the jurisdiction in question can have no application; and this may be the case either from the character of the person permitting the acts, or from the nature of the acts themselves.

§ **565**. From what has been said, it appears that the acts of part performance must in all cases be done by the person asserting the contract with the knowledge of the person sought to be charged that the acts are being done and are being done on the faith of the contract; without such knowledge there would be neither injustice nor fraud.

§ **566**. On the ground that the character of the person permitting the acts prevented the notion of fraud, it has been decided that where a plaintiff seeks to enforce against a remainderman a parol contract entered into between the plaintiff and the tenant for life, acts of part performance which would have bound the tenant for life will not bind the remainderman, unless it can be shown that he permitted the acts of the plaintiff with a knowledge of the contract entered into by the tenant for life.(*y*) For to constitute

(*x*) Caton v. Caton, L. R. 1 Ch., 137; S. C., in D. P. L. R., 2 H. L., 127.

(*y*) Blore v. Sutton, 3 Mer., 237; Whitbread v. Brockhurst, 1 Bro. C. C., 404; per Lord Redesdale in Shannon v. Bradstreet, 1 Sch. & Lef., 72; per Lord Cranworth in Morgan v. Milman, 3 De G. M. & G., 33. See, too, Fleshee v. Trotman, 3 Giff., 9; O'Fay v. Burke, 8 Ir. Ch. R., 225; Hope v. Cloncurry, I. R. 8 Eq., 555.

fraud, there must coincide in one and the same person knowledge of some fact and conduct inequitable having regard to such knowledge. And again, on the same principle, where the acts are those of persons not parties to the contract, they will not be binding; so that, for instance, acts done by arbitrators towards the performance of their duty, are not part performance of a parol contract for a compromise and division of estates by arbitrators.(*z*)

§ **567**. From the nature of the act it follows, that though, as we shall hereafter see, it has been a question how far the acceptance of part of the purchase money binds the vendor, the payment of this on the part of the purchaser can in no wise bind him, because to refuse to complete the contract after paying "part of the purchase money, would be no fraud upon the seller, but his own loss."(*a*) The question was raised in a case where the co-heirs of a purchaser sought the enforcement of the contract against his personal representatives, and set up his part payment as a part performance, making it a binding contract;(*b*) but, on the ground above stated, Grant, M. R., decreed against the claim of the heirs.

§ **568**. Upon the same principle it seems doubtful whether any acts which admit of alternative remedies, one by the execution of the contract and another by some other means, as, for instance, a compulsory taking under the lands clauses consolidation act, can be taken as part performance; because there is no fraud on the other party if the remedy other than that by execution of the contract be pursued.(*c*)

§ **569**. Thirdly, the contract which the acts of part performance allow to be set up by parol evidence must be of such a nature as that the court would have had jurisdiction to enforce it specifically, if it had been in writing. In this respect the jurisdiction of the high court is the same as that of the court of chancery. The rule in the latter court was that where there was jurisdiction in the original subject matter, viz., the contract, the want of writing would not deprive the court of it, where there was part performance. But the want of writing could not itself be made the ground

(*z*) Cooth v. Jackson, 6 Ves., 12.
(*a*) 7 Ves., 345.
(*b*) Buckmaster v. Harrop, 7 Ves., 341; S. C., on appeal, 13 id., 456.
(*c*) See per Lord Cranworth in Morgan v. Milman, 3 De G. M. & G., 35.

of jurisdiction; for, if that were so, all parol contracts required by the Statute of Frauds to be in writing, and in part performed, might have been enforced in equity, which was not the case. Accordingly, a demurrer to a bill for work and labor done, alleging fraud and part performance, was allowed by Lord Cottenham.(*d*)[1]

§ **570**. This principle is illustrated by cases in which there has been a want not of writing, but of a seal Thus, where the plaintiff stated a claim against a company for work and labor done on the estate of the company, and alleged that, as the contract was not under seal, and as the company claimed the legal estate in the land, he had no remedy except in chancery, a demurrer by the company to the plaintiff's bill was allowed.(*e*)

§ **571**. So, again, where the engagement is of an hon-

(*d*) Kirk v Bromley Union, 2 Ph , 640. The case of Pembroke v. Thorpe (3 Sw., 437, n.), may appear at variance with this view, but will be reconciled by considering that Lord Hardwicke held the court to have an original jurisdiction in respect of building contracts. See supra, § 76.

(*e*) Crampton v. Varna Railway Co , L. R. 7 Ch , 562.

[1] *Valuable improvements made by vendee upon real property under a contract for its purchase.*] It is a well-settled rule that, where possession has been surrendered under a parol contract, and the vendee has entered and made valuable improvements, which have enhanced the value of the property, that act constitutes a part performance which will take the case out of the operation of the Statute of Frauds. Wills v. Stradling, 3 Ves., 378; Savage v. Foster, 5 Vin. Abr., 524; Stockley v. Stockley, 1 V. & B., 23; Sutherland v. Brigs, 1 Hare, 26; Mundy v. Joliffe, 5 My. & Cr., 167; Toole v. Medlicott, 1 Ball & B., 393; Surcome v. Pinniger, 3 De G. M. & G., 571; Newton v. Swazey, 8 N. H., 9; Annara v. Merritt, 13 Conn., 478; Tilton v. Tilton, 9 N. H., 385; Dugan v. Colville, 8 Tex., 126; Blakely v. Ferguson, 3 Eng. (Ark.), 272; Grant v. Ramsey, 7 Ohio St., 157; Casler v. Thompson, 3 Green's Ch., 59; Kidder v Barr, 35 N. H., 236; Mason v. Wallace, 3 McLean, 148; Sater v. Hill, 10 Ind., 176; Mims v. Lockett, 33 Ga., 9; Cummings v. Gill, 6 Ala., 562; Williston v. Williston, 41 Barb., 635; Hoffman v. Fett, 39 Cal., 109; Despain v. Carter, 21 Mo., 331; Green v. Finn, 35 Conn., 178; Netherby v. Ripley, 21 Tex., 434; Tohler v. Folsom, 1 Col., 207; School District v. McLoon, 4 Wis., 79; Massey v. McIllwane, 2 Hill's (S. C.) Ch., 421; Johnson v. McGrader, 15 Mo., 365; Finncane v. Kearney, Freem.'s (Miss.) Ch., 65; Outenhouse v. Burleston, 11 Tex., 87; Blunt v. Tomlin, 27 Ill., 93; Bonner v. Cauldwell, Harring.'s (Mich) Ch., 67; Mason v. Blair, 33 Ill., 194; Brock v. Cook, 3 Port., 464; Moreland v. Lemasters, 4 Blackf., 383; Edwards v. Fry, 9 Kan., 417; Greg v. Hamilton, 12 id., 333; Johnson v. Bowden, 37 Tex., 621; Claton v. Frazier, 33 id., 91; Home v. Rogers, 32 id., 218; Freeman v. Freeman, 43 N. Y., 34; Ingels v. Patterson, 36 Wis., 373; Patterson v. Copeland, 52 How. Pr., 460; Perkins v. Hadsell, 50 Ill., 216; Shirley v. Spencer, 4 Gilm., 583; Thornton v. Henry, 2 Scam., 218; Kelly v. Stainsbury, 13 Ohio, 408; Haines v. Haines, 6 Md., 435; Tracey v. Tracey, 14 W. Va., 243; Vickers v. Sisson, 10 id., 12; Pfiffner v. Stillwater and St. Paul R. R. Co., 23 Minn., 343. In De Wolf v. Pratt, 42 Ill , 198, will be found the following: "A verbal contract for the sale of land will be enforced, where it is shown to have been fairly made, on a valuable consideration, a considerable portion of the purchase money paid, no unreasonable delay in paying the whole, possession taken, improvements made, no disposition shown by the plaintiff to evade the contract, and no evidence of hardship."

orary and not of a legal character, part performance gives the court no jurisdiction.(*f*) Thus, in the case of Lord Walpole v. Lord Orford,(*g*) where two testators on the same day, and in the presence of the same witnesses, executed mutual wills; one of the testators having died, it was argued that there was part performance under circumstances which could only be referred to a contract between the testators to make such wills; but Lord Rosslyn, though inferring an agreement of some sort, held it to have been a merely honorable engagement, and one which the court therefore could not carry into effect.

§ **572**. On the same principle there can be no part performance of an incomplete contract. For acts to amount to part performance, the contract "must be obligatory, and what is done "must be done under the terms of the agreement and by force of the agreement."(*h*)

§ **573**. Where, however, the owner of a ship-building yard proposed to construct a siding from it to a railway station close at hand, and obtained from the railway company a general assent to his proposal, and proceeded to make the siding, without the details of the arrangement having been agreed upon, and after the construction of the siding was allowed to use it on terms embodied in an informal memorandum; it was held that even had there not been any actual user, the court would probably have found means to enforce the completion of some arrangement by which the company would have been compelled to allow the siding to be used on reasonable terms, and that, the memorandum showing what were reasonable terms, an arrangement on that footing would be enforced (*i*)

§ **574**. It is, perhaps, scarcely needful to observe that where the possession taken is not under a contract but adverse, the circumstance that there is no common-law remedy does not suffice to give the court jurisdiction.(*j*)

§ **575**. The general character of the acts which are requisite to constitute part performance for the purpose in question having been stated, it is proposed now to show the

(*f*) Cf. supra, § 301.
(*g*) 3 Ves., 402
(*h*) Per Lord Brougham in Lady E. Thynne v. Earl of Glengall, 2 H. L. C., 158.
(*i*) Laird v. Birkenhead R'y Co., Johns., 500.
(*j*) East India Co. v. Nuthumbadoo Veerasawmy Moodelly, 7 Moo. P. C. C., 482.

result of these principles in respect of some particular acts.(*k*)

§ **576**. Possession is in some cases equivocal in respect of the title to which it is to be referred:(*l*) in other cases it is not: therefore, the possession of a tenant, after the expiration of a lease, which was referable only to a contract for a renewal, has been considered part performance of such a contract.(*m*)[1]

§ **577**. Still more clearly "the acknowledged possession of a stranger in the land of another is not explicable except on the supposition of an agreement, and has, therefore, constantly been received as evidence on an antecedent contract."(*n*)[2] Thus, to refer to an often cited case, where a

(*k*) Consider, in addition to the cases referred to in the text Kelly v. Walsh, 1 L. R. Ir., 275, where giving consent to a lease was held to be, under the circumstances of the case, an act of part performance.

(*l*) See Lamare v. Dixon, L. R. 6 H. L., 414; Millard v. Harvey, 34 Beav., 287.

(*m*) Dowell v. Dew, 1 Y. & C. C. C., 345; 12 L. J. Ch., 158; cf. Buckmaster v. Harrop, 13 Ves., 456, 474; Millard v. Harvey, 13 W. R., 125; 10 Jur. (N. S.), 1167; Powell v. Lovegrove, 8 De G. M. & G., 357, 367. Distinguish Brady's Case, 15 W. R., 751.

(*n*) Per Plumer, M. R., in Morphett v. Jones, 1 Sw., 181. See, accordingly, Butcher v. Stapely, 1 Vern., 363; Pyke v. Williams, 2 Id., 455; Earl of Aylesford's Case, 2 Str., 783; Stewart v. Denton, 1 Fonbl. Eq., 187; Savage v. Carroll, 1 Ball & B., 265; Kine v. Bade, 2 Id., 343; Dale v. Hamilton, 5 Ha., 381; Paln v. Coombs, 3 Sm. & Gif., 449; S. C., 1 De G. & J., 34.

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[1] *Rule where possession has been entered upon.*] The doctrine of part performance by possession of the vendee is now well established, both in this country and in England. Mr. Justice Story says: "If upon a parol agreement a man is admitted into possession, he is made a trespasser, and is liable to answer as a trespasser if there be no agreement valid in law or equity. Now, for the purpose of defending himself against a charge as a trespasser, and a suit to account for the profits in such a case, the evidence of a parol agreement would seem to be admissible for his protection, and if admissible for such a purpose there seems no reason why it should not be admissible throughout." Story's Eq. Jur., § 761. See, also, Pugh v. Good, 3 Watts & Serg., 56; Simmonds v. Hill, 4 Har. & Mchew, 251; Jones v. Peterman, 3 Serg. & Rawle, 543; Burns v. Sutherland, 7 Pa. St., 103; Davis v. Townsend, 10 Barb., 333; Bassler v. Niesly, 2 Serg. & Rawle, 352; Letcher v. Crosby, 2 A. K. Marsh., 106; Wilber v. Paine, 1 Ohio St., 251; Abbott v. Draper, 4 Denio, 51; Peifer v. Landis, 1 Watts, 392; McFarland v. Hall, 3 id., 37; Miller v. Hower, 2 Rowle, 53; Gill v. Newman, 13 Minn., 462; Folmer v. Dale, 9 Pa. St., 83; Smith v. Underdunk, 1 Sandf. Ch., 579; *contra*, Catlett v. Bacon, 33 Mass., 269. The rule is very much strengthened by the fact that the possession is accompanied or preceded by the payment of the purchase money, or some part of it. Pike v. Morey, 32 Vt., 37. Drury v. Conner, 6 Har. & Johns., 288; Stevens v. Wheeler, 25 Ill., 300; Underhill v. Williams, 7 Blackf., 125; Tibbs v. Barker, 1 Blackf., 58; Byrd v. Odem, 9 Ala., 755; Sutton v. Sutton, 13 Vt., 71; Wimberly v. Bryan, 55 Ga., 198; Fitzsimmons v. Allen, 39 Ill., 440; Billington v. Welsh, 5 Binney, 120; Gilday v. Watson, 2 Serg. & Rawle, 407; Adams v. Fulham, 43 Vt., 592. Aster v. Lamareaux, 4 Sandf., 524; Kellums v. Richardson, 21 Ark., 137. "The acknowledged possession of a stranger of the land of another is not applicable, except on the supposition of an agreement, and has, therefore, constantly been received as evidence of an antecedent contract." Sir T. Plumer, J., in Morphett v. Jones, 1 Swanst., 181; Butcher v. Sheply, 1 Vern., 363; Pyke v. Williams, 2 id., 455.

[2] But in these cases actual delivery of possession, or assent to taking possession, must be shown. Wrongful possession is not sufficient. Jervis v. Smith, 1 Hoff. Ch., 470; Lord v. Underdunk, 1 Sandf. Ch., 46; see Wagoner v. Speck,

parol contract for a lease was made, and the terms of it were agreed on between the proposed lessor and lessee, and by the direction of the lessor the lessee instructed a solicitor, who acted for both parties, to reduce the terms to writing; and the solicitor took a note of the terms thus stated to him, and from it prepared a draft contract embodying these and other terms, which he submitted to the lessor, who afterwards, without objecting to it, let the lessee into possession, and directed the solicitor to prepare a lease in pursuance of the draft contract; and a draft lease was accordingly prepared, to which the lessor objected, and gave the tenant notice to quit:—the court held that there was part performance of the contract, and enforced the same accordingly.(*o*)

§ **578.** Even where the possession has been taken without consent, yet if the owner afterwards allow the stranger to remain in possession, this will, it seems, operate as an act of part performance.(*p*)

§ **579.** Possession is, it must be observed, part performance both by and against the stranger and the owner:(*q*) the owner has allowed the stranger to do an act on the faith

(*o*) Pain v. Coombs, 1 De G. & J., 34 See, too, Miller v. Finlay, 5 L. T. (N. S.), 510.

(*p*) Gregory v. Mighell, 18 Ves., 328; Pain v. Coombs, 1 De G. & J., 34 46. See, too, per Lord Kingsdown in Ramsden v. Dyson, L. R. 1 H. L., 170.

(*q*) Wilson v. West Hartlepool Railway Co., 2 De G. J. & S., 475, 485.

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3 Ham., 294; Weed v. Terry, Walk. Ch., 501. It was held, in Smith v. Underdunk, 1 Sandf. Ch., 579, that where, upon a parol contract for the sale of two parcels of land, at a gross price, the vendor at the time of completion, conveyed one parcel only, and agreed to convey the other presently, and the purchaser paid the whole price and entered into possession of both parcels, on receiving the deed for the one, the contract was not merged in the deed, and that the purchaser's assent to the delay, and the vendor's agreement to give a deed for the second parcel, did not constitute a new agreement, or substitute for the first; but that the conveyance by one parcel was a part performance of the original contract. In Pugh v. Goods, 3 Watts & Serg., 56, it was said that the delivery of the possession of the whole of the land sold, is sufficient, and entitles the parties to a specific performance. But in Allen's Estate, 1 Watts & Serg., 383, it is decided that the delivery of possession of a part of the land, to a vendee by parol, is not alone sufficient to take the case out of the Statute of Frauds. In Ellis v. Ellis, 1 Dev. Ch., 341, a purchaser of land was put in possession, and paid the purchase money, under a parol contract. Held, that the contract was not thereby taken out of the statute. In Hatcher v. Hatcher, 1 McMullan's Ch., 311, it is decided that remaining in possession by the purchaser, if he was in possession at the time of his purchase, does not constitute such a part performance as will take the case out of the statute. See Brock v. Cook, 3 Porter, 464; Johnson v. Glancy, 4 Blackf., 94. But if the vendee takes and continues possession of the premises, under the contract, and especially if he makes valuable improvements on them, this will be sufficient to satisfy the statute. Johnston v. Glancy, 4 Blackf., 91; Tibbs v. Barker, 1 id., 58; Moreland v. Lemaster, 4 id., 388; Thornton v. Henry, 2 Scam., 218; see Keats v. Rector, 1 Pike, 391.

of the contract, viz., enter on the land: the stranger has allowed the owner to do an act on the faith of the contract, viz., withdraw from the land. They are, therefore, both bound.

§ 580. Possession is, as already pointed out, part performance as well against a company as against a natural person.(r)

§ 581. It is not only in contracts for a sale or a lease that possession is part performance. It may let in parol evidence of any contract explaining the possession. Thus, where A. was in possession of his own land subject to a mortgage, and he, as he alleged, contracted with B. that B. should purchase the land from the mortgagee and hold it for the benefit of A., subject to certain terms for the repayment of the purchase money, and B. afterwards set up the purchase as being an absolute one for his own benefit, the continued possession of A. as owner of the land was held to be part performance of the contract alleged by him.(s) In another case A., by parol, agreed to allow B. the occupation of a leasehold house for life, on payment merely of ground rent, rates and taxes. B. was put into possession, and that possession was held to preclude any objection on the ground of the statute.(t)

§ 582. Many cases have also risen in respect of marriage contracts, where the part performance has excluded the operation of the statute. Thus, in a case, where there was a parol promise before marriage to give certain property to the married pair by the father of the intended wife; the marriage took place, and was followed by the delivery up of possession to the son-in-law, expenditure of money by him, and the absence of all disturbance on the part of the father-in-law; these acts were held to be in part performance of the alleged ante-nuptial contract.(u) And so where a father verbally promised, in consideration of his daughter's marriage, to give her a house as a wedding present, and immediately after the marriage put the daughter and her husband into possession, and continued himself to pay what became due to a building society in respect of an existing mortgage

(r) S. C.
(s) Lincoln v. Wright, 28 L. J. Ch., 705; S. C., 7 W., 124, 350; 4 De G. & J., 16
(t) Coles v. Pilkington, L. R. 19 Eq., 174.
(u) Surcome v. Pinnizer, 3 De G. M. & G., 571. See, also, Floyd v. Buckland, 1 Ferm., 268.

on the house, it was held by the court of appeal (affirming the decision of Malins (V. C.), that the possession took the case out of the statute, and that the balance due to the building society on the father's death was payable out of his estate.(*v*)

§ **583**. The same principle applies in cases of family arrangements involving the giving up, partition, or exchange of land; so that though such arrangements may be by parol, yet, if they be followed by uninterrupted exclusive enjoyment of the several lands in pursuance of the arrangment, the court will specifically enforce them.(*w*)

§ **584**. In considering this effect of possession where the acquiescence has been of very long duration, the court will regard the lapse of time as a circumstance against allowing the statute to be set up.(*x*)[1]

§ **585**. The laying out of money, provided it be such as would only be likely to take place in pursuance of such a contract as that alleged, and it be with the privity of the other party, is an act of part performance.(*y*) Therefore, where a proposed lessee entered and built, the acts were held to be such;(*z*) and, again, the alteration of a garden fence and the plantation of a meadow with the privity of the other party, and partly at his expense, by a tenant in possession, were held acts of part performance, evidencing a contract to demise the meadow for a term.(*a*)[2] So the ex-

(*v*) Ungley v. Ungley, 4 Ch. D., 73; 5 id., 887.

(*w*) Stockley v. Stockley, 1 V. & B., 23; Neale v. Neale, 1 K. & J., 672; Williams v. Williams, 2 Dr. & Sm., 378; affirmed L. R. 2 Ch., 294 (see especially pages 304, 305; Cood v. Cood, 33 Beav., 314.

(*x*) Blackford v. Rockpatrick, 6 Beav., 232; cf. Crook v. Corporation of Seaford, L. R. 10 Eq., 678; 6 Ch., 551.

(*y*) Wills v. Stradling, 3 Ves., 378

(*z*) Savage v. Foster, 5 Vin. Abr., 524, pl. 43; Reddin v. Jarmyn, 16 L. T., 449.

(*a*) Sutherland v. Briggs, 1 Ha., 26. See,

[1] Thus, where a vendee having paid part of the purchase money of land under a parol agreement, had, together with his heirs, been in possession for several years, this was thought sufficient to take the case out of the Statute of Frauds, and to entitle the heirs to a specific performance of the agreement. Cox v. Cox, Peck, 443; see Brock v. Cook, 3 Port., 464.

[2] See Bomier v. Caldwell, Harring.'s Ch., 67; Johnston v. Glancy, 4 Black., 94; Tibbs v. Barker, 1 id., 58; Moreland v. Lemasters 4 id., 583; Thornton v. Henry, 2 Scam., 218. But where a father promised his son that if he would remain with and carry on his farm, he would leave him the farm at his death, the son having already continued with him two years after he came of age, it was held that the continuance of the son to cultivate and manage the farm, and his making extensive improvements thereon at his own expense, it not appearing that he agreed to do so by the contract alleged to have been made with his father, were not considered a part performance of the contract, such as would take the case out of the statute. Carlysle v. Fleming, Harring.'s Ch. 421.

penditure of money, in alterations and repairs of the property, by a sub-lessee with the knowledge of the owner has been held to be part performance of the contract by the owner to let to the sub-lessor.(*b*)

§ **586**. The expenditure of money differs, it will be observed, from possession, in two respects: the one, that whilst mere possession is referable to a tenancy at will, as well as to a larger estate, the laying out of any considerable sums of money is rationally to be referred only to some contract to confer a substantial interest in the property; the other, that whilst possession cannot be supposed to be continued by a stranger without the knowledge of the owner, a person in possession may well lay out money without the owner's cognizance; and what is, therefore, necessarily inferred in the one case must be proved in the other.

§ **587**. There are cases where it has been held that, as money spent in repairs easily admits of compensation, such expenditure is no part performance, and consequently does not avail to take a case out of the statute;(*c*) and where the acts relied on are proper to be brought before a jury, and can be answered in damages, or are in the nature of acts of preparation,(*d*) they will not be considered as part performance. But nothing can be clearer than that there are many acts, easily enough admitting of compensation, which yet amount to such part performance as will enable the court to enforce a parol contract.

§ **588**. If the laying out of money in alterations in pursuance of a contract is a part performance of it, it might be supposed that making a payment of the purchase money payable under the contract was yet more clearly a part performance. But this cannot be said to be the case; for it seems now to be decided that the payment by the purchaser to the vendor of the whole(*e*) or a part, whether substantial or unsubstantial, of the purchase money, is not an act of

also, Stockley v Stockley, 1 V. & B., 23; Toole v. Medlicott, 1 Ball & B., 393; Mundy v. Jolliffe, 5 My. & Cr., 167; Surcome v. Pinniger, 3 De G. M. & G., 571; Farrall v. Davenport, 3 Giff., 363; Norris v. Jackson, Id., 396. Distinguish Millard v. Harvey, 34 Beav., 237.

(*b*) Williams v. Evans, L. R. 19 Eq., 547. See, too, Shillibeer v. Jarvis, 8 De G. M. & G., 79, 87. Distinguish Howe v. Hall, 1 R. 4 Eq., 242; Gardner v. Fooks, 15 W. R. 388.

(*c*) Frame v. Dawson, 14 Ves., 386, cf. Forster v. Hale, 3 Id., 708.

(*d*) O'Reilly v. Thompson, 2 Cox, 271.

(*e*) See per Knight Bruce, L. J., in Hughes v. Morris, 2 De G. M. & G., 356.

part performance which will take the parol contract out of the statute.

§ 589. The grounds of this decision seem to be, first, that the mention of part payment in the 17th section of the Statute of Frauds, and the silence in that respect of the 4th section, must be taken to show that the legislature did not intend that part payment should be binding in cases of the sale of lands;(*f*) and, secondly, that the money may be repaid, and that both parties will then be in the situation in which they were before the contract, without either party having gained any inequitable advantage over the other.(*g*) This is a case where, for the act done, there are alternative remedies, one by the execution of the contract, and the other by repayment,—and the election to put the other party to the latter remedy is no fraud. It has been truly said that this reasoning overlooks the possibility of an insolvency intervening and preventing the repayment of the purchase money,(*g*) and it is difficult to say that the reasoning is satisfactory, but the courts have acted upon it.

The law upon this subject has been somewhat vacillating. In a case before Lord Hardwicke, he held part payment to be part performance;(*h*) but this as a general proposition was early overruled. The question then arose whether, although payment of a small installment was inoperative, payment of the whole or of a substantial part of the price would not be an act of part performance. Lord Rosslyn maintained the affirmative of this question;(*i*) but Lord Redesdale denied any such distinction;(*j*) and Lord Rosslyn's decision seems now to be overruled, upon the ground that it is impossible satisfactorily to discriminate between substantial and unsubstantial part payments.(*k*)[1]

(*f*) Clinan v. Cooke, 1 Sch. & Lef., 22; Watt v. Evans, 4 Y. & C. Ex., 579.
(*g*) Clinan v. Cooke, 1 Sch. & Lef., 22.
(*g*) 13 Ves., 461, note by the reporter
(*h*) Lacon v. Mertins, 3 Atk., 4. See, also, Child v. Comber, 3 Sw., 423 n.
(*i*) Main v. Melbourn, 4 Ves., 720. See the arguments in Wills v. Stradling, 3 Ves., 378, and Simmons v. Cornelius, 1 Rep. in Ch., 138 (a case before the statute).
(*j*) In Clinan v. Cooke, 1 Sch. & Lef., 22.
(*k*) Watt v. Evans, 4 Y. & C. Ex., 579. See Ex parte Hooper, 19 Ves., 479.

[1] See Story's Eq. Jur., § 769. In this country the decisions upon this point are, by no means, harmonious. In Virginia and Mississippi, it has been held that part payment of the purchase money is not such a part performance of a parol contract for the sale of lands, as to take an agreement out of the Statute of Frauds. Jackson v. Cutright, 5 Munf., 308; Hood v. Bowman, 1 Freem.'s Ch., 299; and see Hatcher v. Hatcher, 1 McMullan's Ch., 311. In Michigan it

§ **590**. Payment of the auction duty has been held not to be part performance, it being by the revenue laws essential to the contract, and "that without which there would have been no contract cannot be said to be in part performance of the contract."(*l*)

§ **591**. The same vacillation which characterized the course of the authorities on payment of the purchase money as part performance, has attended the cases dealing with the question whether payment of an additional rent is to be treated as part performance. In the earliest case on the subject, it was laid down that such a payment, if shown or admitted to be on the foot of the contract, is a circumstance of part performance.(*m*) It was subsequently determined not to be,(*n*) but this decision appears to be overruled by the case of Nunn v. Fabian,(*o*) where a landlord, having verbally agreed with his tenant to grant him a lease for twenty-one years at an increased rent, died before the execution of the lease, but after having received from the tenant one quarter's rent at the increased rate: and it was held that this payment constituted a sufficient act of part performance to take the case out of the statute.

§ **592**. It is not easy to think that the whole group of cases dealing with the payment or expenditure of money on the footing of a contract is satisfactory. It would seem reasonable to hold one or other of two things: that all pay-

(*l*) Per Grant, M. R., in Buckmaster v. Harrop, 7 Ves., 346.
(*m*) Wills v. Stradling, 3 Ves., 378.
(*n*) O'Herlihy v. Hedges, 1 Sch. & Lef., 123.
(*o*) L. R. 1 Ch., 35. Consider Howe v. Hall, I. R. 4 Eq., 242; Archbold v. Howth, I. R. 1 C. L., 6.8.

was held, in McMurtrie v. Bennett, Harring.'s Ch., 124, that the payment of the whole of the purchase money, clearly in pursuance of a definite and mutual parol agreement, is sufficient to take the case out of the statute; but the payment of a trifling amount of the consideration is, in no case, of itself, sufficient. But in another case, Townsend v. Houston, Harring.'s Ch., 532, it was decided that payment of part of the purchase money is such a part performance of a parol agreement for the sale of land, as to take a contract out of the statute and authorize a decree for a specific performance. In Connecticut, it is said in Downey v. Hotchkiss, 2 Day, 225, that the legislature adopted not only the English Statute of Frauds, but also the construction given to it by the courts in England. The same remark is made in reference to Pennsylvania, in Pugh v. Good, 3 Watts & Serg., 56. And in Parker v. Wells, 6 Whart., 153, payment of the purchase money by the vendee of land, under a parol contract of sale, does not alone take the contract out of the statute. North Carolina, South Carolina, Missouri, Indiana and Ohio, have followed the same rule, and hold the payment of all the purchase money as insufficient to satisfy the statute. Ellis v. Ellis, 1 Dev.'s Ch., 341; Smith v. Smith, 1 Rich.'s Ch., 130; Anderson v. Chick, 1 Bailey's Ch., 118; Bean v. Valle, 2 Mis., 126; Johnston v. Glancy, 4 Blackf., 94; Site v. Keller, 6 Ham., 483; Pollard v. Kinner, id., 528.

ments of money made by one contracting party with the knowledge of the other, and on the faith of the contract, should be deemed acts of part performance for the purpose in question; or that none of such acts should be deemed to be part performance, and that the court should in all these cases think that the possibility of repayment deprived them of any effect on the Statute of Frauds. It does not seem reasonable to halt between the two opinions.

§ 593. Marriage alone is not a part performance of a contract in relation to it: for to hold this would be to overrule the Statute of Frauds, which enacts that every agreement in consideration of marriage to be binding must be in writing.(*p*)[1] Accordingly, where there was, before marriage, a contract by parol for the settlement of part of the wife's property, and that the husband should take the rest, which he did, but there was no settlement made; and the wife subsequently filed her bill, stating these facts, for the purpose of obtaining a declaration of her rights in certain property coming to her, and the husband, by his answer, admitted the statements in the bill, and a deed was then prepared purporting to be a settlement on the wife in pursuance of the contract, and was signed but not acknowledged by the wife; in a suit by a plaintiff claiming under the settlement against the heir, it was held that there was

(*p*) Per Lord Hardwicke in Taylor v. Beech, 1 Ves. Sen., 297; per Lord Thurlow in Dundas v. Dutens 1 Ves. Jun., 199. As to this case, see the observations of Lord Romilly, M. R., in Warden v. Jones, 23 Beav., 487 (S. C. on appeal, 2 De G. & J., 76). Consider Gilchrist v. Herbert, 29 W. R., 348.

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[1] This clause has not been enacted in all of the States; but, wherever it has been, the requirements of the English statute must be complied with, and its entire interpretation received. Pars. on Contr., vol. 1, pp. 547, 548, and pp. 553, 554, vol. 2, p. 310 (note z).

Marriage contracts; exception.] "There is a difference between agreements on marriage being carried into execution and other agreements; for all agreements besides are considered as entire, and, if either of the parties fail in performance of the agreement in part, it cannot be decreed in specie, but must be left to an action at law. In marriage agreements it is otherwise; for, though the relations of the husband or wife should fail in the performance of their part, yet the children may compel a performance. If the mother's father, for instance, hath agreed to give a portion, and the husband's father hath agreed to make a settlement, though the mother's father do not give the portion, yet the children may compel a settlement, for non-performance on one part shall be no impediment to the children's receiving the full benefit of the settlement. So, if there be a failure on the part of the father's relations it is the same." Lord Hardwick, in Harvey v. Ashley, 3 Atk., 611; see also, Lloyd v. Lloyd, 2 My. & Cr., 204; Dennison v. Gothring, 7 Pa. St., 175; King v. Whitely, 10 Paige's Ch., 465; Nenes v. Scott, 9 How., 197; 2 Story's Eq. Jur., § 986.

no part performance by marriage, nor any other part performance of the parol contract, and that it was void and all the subsequent proceedings ineffectual.(*q*)[1]

§ 591 In a case already referred to, the intended husband and wife, previously to marriage, agreed by a writing, which was held to be unsigned, that the husband should have the wife's property for her life, paying her a certain sum by way of pin-money, and that she should have it back again after his death; and instructions were given for a marriage settlement to have that effect; but no settlement was ever executed, the husband promising, as the wife alleged, to make a will giving her all his property—a promise which, if made, he did not keep. After the husband's death the wife sought specific performance of the antenuptial arrangment, but it was held that there was no contract in writing within the statute, and that the marriage was no part performance.(*r*) This decision was affirmed by the House of Lords,(*s*) but the question of part performance was not there argued.

(*q*) Lassence v. Tierney, 1 Mac. & G., 551. (*s*) L. R. 2 H. L., 127.
(*r*) Caton v. Caton, L. R. 1 Ch., 137.

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[1] *Marriage as part performance.*] Agreements, in consideration of marriage, in order to be binding under the Statute of Frauds, must be in writing; marriage alone, therefore, will not constitute such an act of part performance, as will render valid a parol contract made in relation to it. "The subsequent marriage is not deemed a part performance taking the case out of the statute, contrary to the rule which prevails in other cases of contract. In this respect it is always treated as a peculiar case standing on its own ground." Story's Eq. Jur. In some of the States mutual promises to marry, are expressly excepted from the operation of the statute. These are, Alabama, Rev. Code of 1867, § 1862; California, Code, § 1624; Kentucky, R. S., ch. 22, § 1; Minnesota, Stat. 1873, vol. 1, p. 692, § 6, subd. 3; Nebraska, Stat. 1873, ch. 25, § 6; New York, R. S. (6th ed.), vol. 3, p. 343; Wisconsin, Stat. 1871, ch. 107, § 2.

Time within which the contract is to be performed] The English statute, and the statutes of several of the States, makes it essential to the validity of any verbal agreement, and to the maintenance of any action upon it; that it is to be performed within the space of one year from the making of the same. In New York, and in some of the other States, any such contract, with the exception of leases for one year or less, are void. Peter v. Compton, Skinner, 353; Gilbert v. Sykes, 16 East, 150; Wells v. Horton, 4 Bing., 40; King v. Hanna, 9 B. Mon., 369; Peters v. Inhab. of Westborough, 19 Pick., 365; Izard v. Middleton, 1 Dessau.'s Ch., 116; Thompson v. Gordon, 3 Strobh., 196; Blake v. Cole, 22 Pick., 97; Clark v. Pendleton, 20 Conn., 495; Howard v. Bergen, 4 Dana, 137; McLees v. Hale, 10 Wend., 426; Ellicott v. Turner, 4 Md., 476; Archer v. Zeh, 5 Hill, 200; Tolley v. Green, 2 Sandf. Ch., 91; Roberts v. Rockbottom, 7 Mete., 46; Lyon v. King, 11 id., 411; Doyle v. Dickson, 97 Mass., 209; Quackenbush v. Eble, 5 Barb., 469. Where it is not the intention and understanding that the contract shall be performed within a year, it will not be taken out of the operation of the statute by the fact that it is possible to perform it within that time. Boydell v. Drummond, 11 East, 142; Herrin v. Butters, 20 Me., 119; *contra*, Ellicott v. Turner, 4 Md., 476.

§ **595**. There may, of course, often be acts connected with the marriage which, as independently of it, they would be acts of part performance, are not the less so from being done in connection with it, and therefore differ from cases where the marriage is the sole act relied on. Thus, in a case which was ultimately decided by the House of Lords, it was held that the execution by the husband of a settlement in pursuance of a parol contract entered into by him with the lady's father previously to the marriage being something over and above the marriage, was an act of part performance of the parol contract entered into previously to it.(*t*) In the case of Warden v. Jones(*u*) it was held by Lord Romilly, M. R., that the execution of a settlement is no act of part performance where the previous parol contract is between the intended husband and wife only, and not between the husband and some third person, and that such a settlement must be considered a voluntary deed; and this decision was affirmed by Lord Cranworth.

§ **596**. The cases in which the court relieves on the ground of marriage in fraud of a parol contract entered into previously, must, of course, be distinguished from cases in which the marriage itself is set up as part performance of the contract.(*v*)

§ **597**. But though marriage be not, cohabitation may be a sufficient act of part performance. In a separation deed, the husband covenanted with a trustee for the payment of an annuity to his wife; shortly before the death of the husband, his wife returned to him upon the faith of a promise made by the husband to the wife and her trustee, that if she would do so he would continue to pay the annuity and would charge it upon his real estate. He died without having done so, and it was held that the contract could be enforced against the devisees of the husband, on the ground of part performance.(*w*)

§ **598**. As acts done prior to a contract cannot be referred

(*t*) Hammersley v. De Biel, 12 Cl. & Fin., 45, 64 n.; Surcome v. Pinniger, 3 De G. M. & G., 571.
(*u*) 23 Beav., 487; on appeal 2 De G. & J., 76.
(*v*) See supra, § 553
(*w*) Webster v Webster, 1 Sm. & G., 489; affirmed 4 De G. M. & G., 437 Cf. Alderson v. Maddison, 5 Ex. D., 293, where service as housekeeper and giving up other prospects in life were regarded by Stephen, J., as part performance; but his decision was reversed on appeal, W. N., 1881, p. 68.

to it as done in pursuance of it, they can never be treated as acts of part performance.(*x*)

§ **599**. And so, also, acts subsequent to the contract, and even in pursuance of it, if not strictly in performance of the contract as between the parties to it, but preparatory to such performance, cannot be taken as part performance. It is evident that acts of this sort may be, and for the most part are, the mere acts of the party doing them: the other party is not necessarily cognizant of them, and consequently he is not so bound by them as to render it fraudulent in him subsequently to refuse to carry the contract into effect. Therefore, giving instructions for a lease,(*y*) putting a deed into a solicitor's hands to prepare a conveyance,(*z*) giving orders for a conveyance to be drawn and going several times to view the estate,(*a*) the execution and registration of the deeds by the vendor,(*b*) and the admeasurement of the estate,(*c*) have all been decided not to be acts of part performance binding on the other party to the contract. So again, where it was a condition of the contract that the plaintiff should obtain a release of a right from a third party, which the plaintiff did obtain by payment of a valuable consideration; it was held to be merely a preparatory act on the part of the plaintiff, and not a part performance of the contract.(*d*)[1] And the appropriation of money by a party,

(*x*) Parker v Smith, 1 Coll., 608, 623
(*y*) Cole v. White, cited 1 Bro. C. C., 409.
(*z*) Redding v. Wilkes, 3 Bro. C. C., 400.
(*a*) Clerk v. Wright, 1 Atk., 12, Cooke v. Tombs, 2 Anstr., 420.
(*b*) Hawkins v Holmes, 1 P. Wms., 770; cf. Phillips v. Edwards, 33 Beav., 444, 445.
(*c*) Pembroke v Thorpe, 3 Sw., 437 n.
(*d*) O'Reilly v. Thompson, 2 Cox, 271.

[1] *Payment of money alone is not part performance.*] The rule is now well settled, and all the best authorities agree, that the vendee will not be entitled to the specific performance of a parol contract for the purchase of real property or an interest therein, merely upon the payment of money, where nothing else is done. Newland on Contracts, ch. 10, p. 187; O'Herlihy v. Hedges, 1 Leh. & Lef., 129; Coles v. Trecothick, 9 Ves., 234; Alsop v. Patten, 1 Vern., 472; Lord Pengall v Ross, 2 Eq. Cas. Abr., 46, pl 12; Leake v. Morris, 2 Ch. Cas., 135; Jackson v. Cutright, 5 Munf., 303; Garner v. Stubblefield, 5 Tex., 552; Mialhi v. Lassabee, 4 Ala., 712; Black v. Black, 15 Ga., 445; Hart v. McLellan, 41 Ala., 251; Sites v. Keller, 6 Ohio, 483; Dugan v. Colville, 8 Tex., 126; Wood v. Jones, 35 id., 64; Netherly v. Ripley, 21 id., 434; Parker v. Wells, 6 Whart., 153; Hood v. Bowman, Freeman's (Miss.) Ch., 290; Blanchard v. McDougall, 6 Wis., 167; Smith v. Finch, 8 id., 245; Cogger v. Lansing, 43 N. Y., 559; Cole v. Potts, 10 N. J. Eq., 67; Park v. Leawright, 20 Mo., 80 Underhill v. Allen, 18 Ark., 466; Workman v. Guthrie, 29 Pa. St., 445; Bladett v. Hildreth, 103 Mass., 404; Lang v. McLaughlin, 14 Minn., 72; Odell v. Montross, 68 N. Y., 499; Gilbert v. Trustees, etc., 12 N. J. Eq., 180.

Judge Story's rule as to part performance.] "Nothing is to be deemed a part performance which does not put the party into a situation which is a fraud upon him, unless the agreement is fully performed." Story's Eq. Jur., § 761; see, also, Temple v. Johnson, 71 Ill., 13.

though it may be with a view to an intended purchase, is not of itself any part performance or evidence of any contract.(*e*)

§ **600**. To the same principle may probably be referred the case of Whaley v. Bagnel,(*f*) in the House of Lords. A. agreed by parol with B. for the purchase of lands: B. delivered a rent-roll to A., which showed by its heading that a contract had been entered into between them for the sale of the lands comprised in it at twenty-one years' purchase, and an abstract of the title and deeds was also delivered to A. for the purpose of effecting the sale; B. informed his creditors by letter that he had agreed to sell the land to A.: he took A. over the estate, introduced him as landlord to the tenants, and refused to renew leases and do other acts of management as owner, in these cases referring the tenants to A. B. also set up the contract against an elegit, and on the strength of it obtained a verdict finding him not to be seized of the lands in question: but notwithstanding all these circumstances, a plea of the Statute of Frauds was allowed.

§ **601**. In Phillips v. Edwards,(*g*) land being vested in a trustee for a married woman with power to lease at her request in writing, the two verbally agreed to let it, and executed a lease of it; but before her solicitor had parted with the deed, and before the plaintiffs (the would-be lessees) had executed the counterpart, the married woman (who had made no written request to the trustee) signified her intention to retire from the transaction. It was held by Lord Romilly, M. R., that her execution of the lease was no part performance, and that there was no binding contract.

§ **602**. But where the contract between A. and B. comprises acts between A. and B. and also between B. and C., and A. may be supposed to have an interest or to have stipulated in respect of the acts between B. and C., part performance with knowledge of this part of the contract renders it binding on A. This seems to be illustrated by the case of Parker v. Smith.(*h*) There a lessor entered into a parol contract with a colliery company, holding a lease from him,

(*e*) East India Co. v. Nuthumbadoo Veerasawmy Moodelly, 7 Moo. P. C. C., 482, 497.
(*f*) 1 Bro. P. C., 345.
(*g*) 33 Beav., 440.
(*h*) Coll., 608.

and consisting of four partners, of whom two were his sons, that one of his sons and one of the other partners should retire and leave the benefit of the business to the remaining two, and that thereupon he would consider the subject of rent, which it was found was put too high in the original lease, and refer the subject to a competent person, and on the report of that person being made, would, if the report should seem right, adopt it, and grant a new lease. The dissolution of partnership so agreed on took place, and the two continuing partners released the others: these acts, being referable only to the contract, were held to take the case out of the Statute of Frauds, and specific performance of the contract to grant the lease was enforced against the lessor's assignees in bankruptcy.

§ **603**. In a recent Irish case, B. being tenant to A. surrendered his lease on the faith of a parol contract by A. to grant a new lease to C.: the surrender was held an act of part performance, and the contract was enforced against A.'s representatives.(*i*)

§ **604**. Fourthly, the effect of part performance being, as we have seen, to show that there is a contract, and to let in parol evidence of the terms of that contract, it becomes necessary to inquire on what evidence or admission of the contract the court will act.

§ **605**. The cases which require to be considered may be classified as follows:

(1) Where the defendant admits the contract as alleged.

(2) Where the defendant denies the contract as alleged, and the plaintiff supports his case by one witness only.

(3) Where the defendant denies the contract as alleged, and the evidence proves a contract, but different from that alleged by the plaintiff.

(4) Where the defendant denies the contract as alleged, but admits another contract.

§ **606**. (1) An admission of the contract in the pleadings, of course, precludes the necessity of further proof: and the fact that the defense claims the benefit of the Statute of Frauds is immaterial in case of part performance, for that excludes the operation of the statute.(*j*)

(*i*) Re Cooke's Trustees' Estate, 5 L. R. Ir. (*j*) Ccoth v. Jackson, 6 Ves., 12.

§ **607**. (2) Under the practice of the court of chancery, where the contract was positively denied by the answer and was proved only by the unsupported evidence of one witness, that was not allowed to prevail: but where the one witness was corroborated in his statements by circumstances, the proof might prevail over the denial.(*k*) But now that the defense is not put in upon oath, the court would, no doubt, feel itself justified, in a proper case, in acting upon the evidence of a single witness against the unsworn denial of the defendant. But if the defendant, in answer to interrogatories or by his evidence, swore positively to the denial, the court would probably refuse to act upon the affirmative evidence of a single witness, if uncorroborated.

§ **608**. (3) In considering the cases in which a variation has arisen between the contract alleged and that proved, it must be borne in mind that the burthen of proving his case rests, of course, on the plaintiff, and, therefore, if there be any such conflict of evidence, as leaves any uncertainty in the mind of the court as to what the terms of the parol contract were, its interference will be refused.(*l*)[1]

§ **609**. Therefore, where there were variations between the evidence of the one witness and a memorandum of the contract in a pocket-book which was produced, the witness

(*k*) East India Co. v. Donald, 9 Ves., 275; Morphett v. Jones, 1 Sw., 172; Toole v. Medlicott, 1 Ba. & B., 393.

(*l*) Lindsay v. Lynch, 2 Sch. & Lef., 1; cf. Price v. Salusbury, 32 Beav., 446.

[1] *Variance between contract and proof.*] The contract set out in the pleadings as partly performed, must be the same one originally entered into; but, "if the contract proved correspond with that described in the pleadings, it will be established and enforced even if there is some variance between the terms described and those proved provided this variance does not relate to matters of substance. If there be evidence of a contract, but it do not distinctly appear what are the terms thereof, and there seems also to have been an act applicable only on the supposition of an agreement, a court of chancery will exert itself to ascertain the precise terms, and, if necessary for that purpose, will direct a trial at law, and then, if the agreement can be defined, and the acts of part performance be consistent therewith, it will decree a specific execution thereof." Marcy, J., in Harris v. Knickerbacker, 5 Wend., 638; see, also, Miller v. Cotton, 5 Ga., 341; Phillips v. Thompson, 1 John.'s Ch., 149; Printup v. Mitchell, 17 Ga., 558; Minturn v. Baylis, 33 Cal., 129; Colson v. Thompson, 3 Wheat., 336; Bremer v. Wilson, 17 N. J. Eq., 180; Chanley v. Hanbury, 13 Pa. St., 16; Cooper v. Carlisle, 17 N. J. Eq., 525; Force v. Dutcher, 18 id., 401, Long v. Duncan, 10 Kan., 294; Petrick v. Ashcroft, 19 N. J. Eq., 339; Parkhurst v. Van Courtlandt, 1 John.'s Ch., 284; Gosse v. Jones, 73 Ill., 508; Blanchard v. McDougall, 6 Wis., 167; Worthington v. Semmes, 38 Md., 298; Knoll v. Harvey, 19 Wis., 99; Reese v. Reese, 41 Md., 554; Wright v. Wright, 31 Mich., 380; Allen v. Webb, 64 Ill., 342; Hall v. Hall, 1 Gill, 383; Pierce v. Catron, 23 Gratt., 588; Shropshire v. Brown, 45 Ga., 175; Stoddart v. Tuck, 5 Md., 37; Smith v. Crandall, 20 Md., 500.

mentioning 1,000 guineas, exclusive of timber, as the price, whilst the pocket-book made no mention of the timber, the court dismissed the bill.(*m*) And where a contract was alleged by the bill, another proved by the plaintiff's one witness, and a third admitted by the two defendants, specific performance was decreed according to the contract set up by the answers; but Lord Rosslyn considered that in strictness the bill ought to have been dismissed.(*n*) In a more recent case, where one contract was alleged and another proved, the bill was dismissed without prejudice to the filing of another bill.(*o*) The inclination of Lord Cottenham's mind seems to have been to struggle with apparently conflicting evidence, rather than to dismiss the bill, where there had been part performance.(*p*) In one case Turner, L. J., observed that "there are cases in which the court will go to a great extent in order to do justice between the parties when possession has been taken, and there is an uncertainty about the terms of the contract."(*q*) And in the case of Oxford v. Provand,(*r*) where there had been part performance of a contract alleged to be vague in its terms, Sir William Erle in delivering the judgment of the privy council said, "With respect to the supposed vagueness of the memorandum of agreement, their lordships propose to consider what is the true construction of that memorandum, having regard to the terms of the instrument and to the surrounding circumstances, and also in reference to this suit for specific performance, and to the conduct of the parties in the interval between the making of the agreements and the commencement of the suit."

§ 616. Where the variation between the contract alleged and that proved consists in the plaintiff's admission of some term against himself, or omission of some term in his favor;(*s*) or where the term which constitutes the variation is immaterial, from its being merely the expression of what would be implied or from its having been actually performed, the court will not refuse the evidence of the con-

(*m*) Reynolds v. Waring, You., 346.
(*n*) Mortimer v. Orchard, 2 Ves. Jun., 243; cf. London and Birmingham Railway Co. v. Winter, Cr. & Ph., 57.
(*o*) Hawkins v. Maltby, L. R. 3 Ch., 188. The fresh bill was filed: L. R. 6 Eq., 505; 4 Ch., 200.
(*p*) Mundy v. Jolliffe, 5 My. & Cr., 167.
(*q*) East India Co. v. Nuthumbadoo Veerasawmy Moodelly, 7 Moo. P. C. C., 482, 497. See supra, § 318.
(*r*) L. R. 2 P. C., 135.
(*s*) Clifford v. Turrell, 1 Y. & C. C. C., 138.

tract. So that where a tenant alleged that he was to pay taxes and do necessary repairs, and the contract proved did not contain this term:(*t*) and again, where a plaintiff admitted a contract to drain the lands generally, and he only proved one to drain where necessary, and he also stated, as part of the contract, that he was to lay certain arable land into pasture, which was not proved by the evidence:(*u*) in each of these cases, the variation was considered as no reason for rejecting the evidence of the contract.(*v*)[1]

§ **611**. It is, perhaps, not quite clearly decided whether the court can, in any case, direct an inquiry into the terms of a contract, when it has not been sufficiently proved to enable the court to pronounce a final judgment upon the evidence before it. Lord Manners (*w*) strongly expressed an opinion that the court has no such jurisdiction, a view which seems to have met with the approval of the highest authorities.(*x*) And in the case of Crook v. Corporation of Seaford,(*y*) where Stuart, V. C., had made an order giving the parties liberty to apply in chambers in reference to the performance of the contract, Lord Hatherley said, that he felt some difficulty about the decree, for it was the duty of the court to ascertain whether there was a contract, and, if not, to dismiss the bill; but, being himself of opinion

(*t*) Gregory v. Mighell, 18 Ves., 328.
(*u*) Mundy v. Jolliffe, 5 My. & Cr., 167.
(*v*) See supra, § 279.
(*w*) Savage v. Carroll, 2 Ball & B., 451.
(*x*) St Leon. Vend., 126; Story, Eq. Jur., § 764; cf. London and Birmingham Railway Co. v. Winter, Cr. & Ph., 57.
(*y*) L. R. 10 Eq., 678; 6 Ch., 551.

[1] *How the contract should be pleaded.*] It is sufficient to allege that there was a written contract; that it was signed is implied. Rist v. Hobson, 1 Sim. & Stu., 543; Barkworth v. Young, 4 Drew, 1. The defendant, in his answer, must insist that the contract was not in writing, where the answer admits the agreement. Gunter v. Halsey, Ambl., 586; Rondeau v. Wyatt, 2 H. Bl., 68; Limondson v. Sweed, Gilb., 35; Harris v. Knickerbacker, 5 Wend., 638; Talbot v. Bowen, 1 A. K. Marsh., 437; Coles v. Bowne, 10 Paige's Ch., 526; Champlin v. Parish, 11 id., 405; Dean v. Dean, 9 N. J. Eq., 425; Walker v. Hill, 21 id., 191; Kirksey v. Kirksey, 30 Ga., 156; Hollingshead v. McKenzie, 8 id., 457; Artz v. Grove, 21 Md., 456; Garner v. Stubblefield, 5 Tex., 552; Woods v. Dillie, 11 Ohio, 455; Dyer v. Martin, 4 Scam., 146; Tarlton v. Vietes, 1 Gilm., 470, Switzer v. Skiles, 3 id., 529; Minns v. Morse, 15 Ohio, 568; Trapnall v. Brown, 19 Ark., 39; Winn v. Albert, 2 Md. Ch., 169; McGomen v. West, 7 Mo., 569; Whiting v. Gould., 2 Wis., 552; Semmes v. Worthington, 38 Md., 298; Burt v. Wilson, 28 Cal., 632; Vandwyne v. Vreeland, 12 N. J. Eq., 142; Esmay v. Groton, 18 Ill., 483; Billingslea v. Ward, 33 Md., 48. A contract is not illegal for being within the Statute of Frauds. The court will not interpose the statute in such a case; it must be pleaded, and where the pleadings do not urge the defense, it will generally be regarded as waived. Fall v. Hazelrigg, 45 Ind., 576.

that a contract had been made out, his lordship varied the order by striking out the reference to chambers, and declaring what the contract between the parties was, and ordering specific performance of it.

§ 612. The authorities upon the point now under discussion to which reference has been made, were all under the old practice, and were greatly influenced by the incapacity of the court of chancery, except under very unusual circumstances, to permit an amendment of the record at the hearing. The high court will probably feel itself freed from some of the difficulties which arose in dealing with cases when one contract was alleged and another proved: it will probably, for the most part, feel it possible to deal with the matter once for all, and not to postpone the real discussion till a further proceeding shall have been taken: it is probable that the main question will always appear to be—Was there really and in truth a contract or not? that if there were, the court will generally allow the needful amendment to put that contract in issue: that if there were not, it will generally give judgment for the defendant, without reserving any right to the plaintiff to institute fresh proceedings. But the circumstances will govern the discretion of the court in each case which may arise.

§ 613. (4) It remains to consider the cases in which the contract alleged by the plaintiff has been denied, but another has been admitted by the defendant. In such cases, if the acts of part performance were consistent alike with the one contract and the other, Lord Redesdale seems to have considered that there was no case to admit proof of the contract of alleged by the bill, and that the acts of part performance must be such as to show them to have been done in pursuance of the very same contract as that alleged.(*z*) It is, however, submitted that this view of the case is inconsistent with the general doctrine of the operation of the acts of part performance; that they open the whole question of the terms of the contract to parol evidence; and that as a written contract where there are acts of part performance may be added to by parol,(*a*) so a contract set up by the defense may be modified by parol. If this were not so,

(*z*) Lindsay v. Lynch, 1 Sch. & Lef., 1. See supra, § 558.

(*a*) Sutherland v. Briggs, 1 Ha., 26.

the plaintiff would be at the mercy of the defendant; for, whereas, if he simply denied the contract, the plaintiff would have an opportunity of proof by parol: when he set up some other contract, all that evidence would be excluded.(*b*)

§ **614**. It may be added that the existence of a signed but incomplete contract is no obstacle in the way of proving the additional terms by parol where there is part performance;(*c*) for the whole might have been proved by parol, and so may part. The doctrine of parol variation has, of course, no application, where by reason of acts of part performance parol evidence is admissible.

(*b*) Cf., also the case of Tomkinson v. Staight, 17 C. B., 697.

(*c*) Sutherland v. Briggs, 1 Ha., 26, 35. Consider Price v. Salusbury, 32 Beav., 446.

CHAPTER XII.

OF THE FORMALITIES REQUIRED IN CONTRACTS BY CORPORATIONS.

§ **615**. Questions relative to the formalities requisite to render a contract binding on a body corporate have so often arisen in proceedings for specific performance that it is expedient to give an outline of the law on this point.

§ **616**. When the party whom it is sought to charge with a contract is a corporation, the contract must, subject to the exceptions mentioned below, be under the common seal; it being the rule of law (*a*) that in no other way can a corporation express its intentions. This rule is, however, subject to certain important exceptions.

§ **617**. (1) The rule does not apply to the contracts of trading corporations (*b*) having relation to the trade which they are constituted to carry on, nor to contracts of so every-day a character as would make the affixing of the common seal to them a practical inconvenience. (*c*)

§ **618**. (2) There are various statutes enabling certain classes of corporations to contract otherwise than under their common seal. The principal provisions for this purpose now in force are comprised in the companies clauses consolidation act, 1845, which regulates railways and other undertakings of a public character, and the companies act, 1867, which regulates companies constituted under the companies act, 1862.

§ **619**. The companies clauses consolidation act, 1845 (8 and 9 Vict., c. 16), § 97, (*d*) is as follows:

"The power which may be granted to any such committee [of directors] to make contracts, as well as the power of the

(*a*) 1 Bla. Comm., 475.
(*b*) South of Ireland Colliery Co. v. Waddle, L. R. 3 C. P., 463; 4 C. P., 617.
(*c*) Sanders v. St. Neots Union, 8 Q. B., 110; Clarke v. Cuckfield Union, 21 L. J. Q. B., 349; Nicholson v. Bradfield Union, L. R. 1 Q. B., 620; Smith v. Birmingham and Staffordshire Gas-Light Co., 1 A. & E., 526.
(*d*) See Leominster Canal Navigation Co. v. Shrewsbury and Hereford Railway Co., 3 K. & J., 654.

directors to make contracts on behalf of the company, may lawfully be exercised as follows (that is to say):

"With respect to any contract which, if made between private persons, would be by law required to be in writing, and under seal, such committee or the directors may make such contract on behalf of the company in writing, and under the common seal of the company, and in the same manner may vary or discharge the same:

"With respect to any contract which, if made between private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, then such committee or the directors may make such contract on behalf of the company in writing, signed by such committee or any two of them, or any two of the directors, and in the same manner may vary or discharge the same:

"With respect to any contract which, if made between private persons, would by law be valid although made by parol only, and not reduced to writing, such committee or the directors may make such contract on behalf of the company by parol only without writing, and in the same manner may vary or discharge the same:

"And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors, and all other parties thereto, their heirs, executors or administrators, as the case may be; and on any default in the execution of any such contract, either by the company or any other party thereto, such actions or suits may be brought, either by or against the company, as might be brought had the same contract been made between private persons only."

§ **620**. The 37th section of the companies act, 1867 (30 and 31 Vict., c. 131)(*e*), is as follows:

"Contracts on behalf of any company under the principal act [the companies act, 1862], may be made as follows (that is to say):

"(1) Any contract which, if made between private persons, would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing under the common seal

(*e*) See Beer v. London and Paris Hotel Co., L. R. 20 Eq., 412; Jones v. Victoria Graving Dock Co., 2 Q. B. D., 314.

of the company, and such contract may be in the same manner varied or discharged:

"(2) Any contract which, if made between private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, may be made on behalf of the company in writing, signed by any person acting under the express or implied authority of the company, and such contract may in the same manner be varied or discharged:

"(3) Any contract which, if made between private persons, would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under the express or implied authority of the company, and such contract may, in the same way, be varied or discharged:

"And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors, and all other parties thereto, their heirs, executors or administrators as the case may be."

§ **621**. Somewhat similar provisions with regard to the contracts of companies were contained in the joint-stock companies registration act, 7 and 8 Vict., c. 110, §§ 44–46; the joint-stock banks registration act, id., c. 113, § 22 (as to bills of exchange and promissory notes only), and the joint-stock companies act, 1856, § 41. But these acts are now repealed.

§ **622**. (3) Another exception arises from the doctrine of part performance; for it appears to be clear that such part performance as will prevent an ordinary defendant from setting up the defense of the Statute of Frauds, will prevent a defendant company from setting up either that defense or a defense grounded on the absence of the corporate seal, or of the statutory formalities, in accordance with which the company may be enabled to contract. This was clearly laid down in the case of Wilson v. West Hartlepool Harbor and Railway Co.,(*f*) and there are other authorities leading to the same conclusion.(*g*) It must, however, be

(*f*) 34 Beav., 187; 2 De G. J. & S., 475.

(*g*) Marshall v. Corporation of Queenborough, 1 S. & S., 520; Maxwell v. Dulwich College, 7 Sim., 222; London and Birmingham Railway Co. v. Winter, Cr. & Ph., 57; Earl of Lindsey v. Great Northern Railway Co., 10 Ha., 664; Crook v. Corporation of Seaford, L. R. 10 Eq., 678; 6 Ch., 551; Mayor, etc., of Drogheda v. Holmes, 5 H. L. C., 460.

added that part performance by a company of a contract not under seal, which is not in its nature the subject of specific performance, as, *e. g.*, a contract for work and labor, will not give the court jurisdiction.(*h*)

§ **623**. The subject chiefly dealt with in this chapter is more fully discussed in various works on corporations and companies with which our law libraries abound, amongst which the well-known work of Mr. Justice Lindley has long held the foremost place.

(*h*) Crampton v. Varna Railway Co., L. R. 7 Ch., 562; supra, § 84.

CHAPTER XIII.

OF MISREPRESENTATION.

§ 624. A misrepresentation, having relation to the contract, made by one of the parties to the other of them, is a ground for refusing the interference of the court in specific performance at the instance of the former party; and may in certain cases be a ground for its active interference in setting aside the contract at the instance of the latter.(*a*)[1]

(*a*) Edwards v. M'Leay, Coop., 308; S. C., 2 Sw., 287; Gibson v. D'Este, 2 Y. & C. C. C., 542, reversed in D. P., s. n., Wilde v. Gibson, 1 H. L. C., 605; St. Leon. Law of Prop., 614.

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[1] *False statements with relation to a contract sought to be specifically enforced.*] Both law and equity will prevent the enforcement of a contract, where there has been a deliberate misrepresentation of a material fact. Broderick v. Broderick, 1 P. Wms., 240; Jennings v. Broughton, 6 De G. M. & G., 126; McShane v. Hazlehurst, 50 Md., 107. Where the statements are recklessly made, without knowledge of their truth, this is a fraud, even when there is no evil intention. Taylor v. Ashworth, 11 M. & W., 413; Rawlins v. Wickham, 3 De G. & J., 304; Stone v. Demy, 4 Metc., 151; Hazard v. Irwin, 1 B. Pick., 96; Lindsley v. Veasey, 62 Ala., 421. Where one party to a contract deliberately makes a misrepresentation with relation to it, a court of equity will refuse to decree specific performance between the parties. Edwards v. McLeay, 2 Swanst., 287; Lord Gordon v. Lord Hutford, 2 Mad., 106; Monroe v. Taylor, 8 Hare, 56; Wilde v. Gibson, 1 H. of Lds., 605; Clowes v. Higginson, 1 Ves. & Beav., 524; Stapylton v. Scott, 13 Ves., 425; Swaisland v. Dearsley, 29 Beav., 430; Cockrane v. Willis, L. R., 1 Ch., 58; Harnett v. Yielding, 2 Sch. & Lef., 549; Wuesthoff v. Seymour, 22 N. J., 69; Plummer v. Kepler, 26 id., 481; James v. State Bank, 17 Ala., 69; Fuller v. Perkins, 7 Ohio, 196; Solinger v. Jewett, 25 Ill, 479; Gilroy v. Alis, 22 Iowa, 174; Cuff v. Dorland, 50 Barb., 438; Snedaker v. Moore, 2 Duvall, 542; Spure v. Benedict, 99 Mass., 406; Hill v. Brower, 76 N. C., 124.

Fraudulent representations; partnership formed on account of.] A party made false and fraudulent representations with respect to the extent of his business, and a partnership was made for a definite time. Held, that equity would decree that the partnership should be annulled, and that the fraudulent party should be restrained from the use of his partner's name in the business; and that defendant must repay the money received on account of the partnership. Smith v. Everett, 126 Mass., 304. It will be good reason for rescinding the contract where it is shown that a direct falsehood has been told, or a truth has been concealed, which, if known, would have been a good reason for causing the terms of the contract to be different. In such a case, the party who is damaged by such fraud may, if an action is brought against him founded on the contract, successfully defend, or he may rescind the contract; he may also have the damages that he can show himself to have sustained. Thweatt v. McLeod, 56 Ala., 375; see, also, Raynor v. Wilson, 43 Md., 440; Comyn on Contracts, vol. 3, 304. In a note to Lynch v. Brockhoff, 15 Abb. Pr., 357, will be found the rule which operates to prevent specific performance being decreed

Representations are most usually by words, written or spoken, but they may be by act, as, for instance, by the performance of fraudulent experiments, on the faith of which a contract was entered into for a license under a patent.(*b*)[1]

(*b*) Lovell v. Hicks, 2 Y. & C. Ex., 46.

where fraud, surprise, mistake or hardship are pleaded. See, also, Quinn v. Roath, 37 Conn., 16.

Either the law or the facts may be fraudulently misrepresented.] A court of equity will not only refuse to decree specific performance when such is the case, but will relieve against it. Broadwell v. Broadwell, 1 Gilm., 599.

For examples of misrepresentation which were relieved against, see Wells v. Millett, 23 Wis., 64; Holmes' App., 77 Pa. St., 50; Carmichael v. Vandebur, 50 Iowa, 651; Hickey v. Drake, 47 Mo., 369; Kelley v. Sheldon, 8 Wis., 258; Chestnut Hill Res. Co. v. Chase, 14 Conn., 123; Warner v. Daniels, 1 Wood. & Minot, 90; Gazzard v. Webb, 4 Porter (Ala.), 73. In Dale v. Roosevelt, 5 John.'s Ch., 173 (aff'd, 2 Cow., 129), there was no evidence of fraud, or intentional misrepresentation.

Deception may consist of acts as well as words.] "A nod, or a wink, or a shake of the head, or a smile from the purchaser, intended to induce the vendor to believe the existence of a non-existing fact, which might influence the price of the subject to be sold, is a fraud at law. So, *a fortiori*, would work a contrivance on the part of the purchaser, better informed than the vender of the real value of the subject to be sold, to hurry the vendor into an agreement without giving him the opportunity of being fully informed of its real value, or time to deliberate and take advice respecting the conditions of the bargain." Lord Campbell, in Walters v. Morgan, 3 De G. F. & J., 724.

[1] If one person makes a representation to another who is about dealing with him upon the faith thereof, he shall make it good if he knew it to be false; but to induce a court of equity to interfere in such a case, it must be shown that the misrepresentation was in a matter important to the interests of the other party, and that it actually did mislead him. And the same consequences follow a misrepresentation, if the party make the assertion recklessly, without knowing whether it was true or false, or even innocently, if it operated as a surprise. But a misrepresentation in a matter of opinion and fact, open to the inquiries of both parties, and in respect to which neither can be presumed to have trusted the other, unless there be fraud, in cases of peculiar relationship or confidence, or whether the other party has justly reposed upon it, and been misled, furnishes no ground for relief. Juzan v. Toulmin, 9 Ala., 662. So, where the vendor of a forty-acre tract of land, well knowing the location of the corners and lines, represented one of the lines so to run as to embrace nine or ten acres of cleared land, when, in truth, it contained much less, and the difference of value between the land pointed out and that conveyed amounted to almost one-third the purchase money, it was held that these facts were such misrepresentations as entitled the vendee to have the contract set aside. Elliot v. Boaz, 9 Ala., 272. Warner v. Daniels, 1 W. & M., 90, is also a case in point. There D. purchased a farm, paying him therefor in shares of the stock of the Cleft Ledge Granite Co., which he represented to be worth $6,000. Several representations were made to W. by D., and also by F., who was concerned in the same company, to induce W. to take the stock in payment, which representations proved to be false, and the stock worthless. On a bill in equity by W. for relief, it was decreed that the sale should be rescinded, the shares reconveyed by W. to D., and the farm by D to W., and a master appointed to report the amount of rents and waste, after deducting permanent improvements which should be allowed by W. to D. Where a conveyance is set aside for misrepresentations, the ground of the decision must be considered to have been fraud; and, in such a case, interest is to be paid and the money refunded without reference to any demand, and from the time it was received, and interest on the interest from the time of its payment on any notes originally given. Doggett v. Emerson, 1 W. & M., 195. It is of no consequence that the con-

§ 625. Such misrepresentations may be resolved into some or all of the following elements, namely,—first, a

tract, of which a recission is sought on these grounds, does not contain the misrepresentation upon which relief is asked. Hough v. Richardson, 3 Story, 659. And where the vendee of land made representations respecting the value of what was taken for the consideration, which were false in material points, and which influenced the vendor to sell, it was held that whether the vendee knew them to be false or not, they would vitiate the sale. So, also, if they were made by another person, in the presence of the vendee, and he was benefited by them. Warner v Daniels, 1 W. & M., 90. The same consequences would result, although there was no fraudulent intent on the part of the party making the representations. Taylor v. Fleet, 1 Barb., 471. It is, however, necessary that the party deceived should, in cases arising from false representations, have entered into the contract upon the faith of these representations. Id. A misrepresentation made by the vendor *in a matter of substance* affecting the value of the estate sold, is a good defense to a suit by him for a specific performance, although *both* vendor and vendee were ignorant of its untruth. Best v. Stow, 2 Sandf.'s Ch., 298. Relief will not be granted where the vendee has had opportunity of making an examination of the property, concerning which the false representations have been made Mason v. Crosby, 1 W. & M., 342; Hough v. Richardson, 3 Story, 659. And so where A. gave a certificate that certain lands which he had "partially explored" contained, "as far as my knowledge extends," a certain average of timber, and it appeared that the purchasers, to whom it was given, had as full means of knowledge as A., it was held that they were not entitled to place implicit reliance thereon, and make it the basis of their contract, but that they should have investigated the grounds of the opinion therein expressed, and the extent of the exploration by A. Id. But an examination, however, will not prevent a recovery for fraud, if falsehood was practiced in respect to some of the examination; as, for example, the quality of timber in this case, and the size of streams on the lands sold upon which to float timber, or any matter within the vendor's knowledge; and if the purchaser, relying in part on the false representations, made only a slight examination, he will be entitled to relief. Mason v. Crosby, 1 W. & M., 342. Nevertheless, no purchaser is at liberty to remain intentionally ignorant of facts relating to his purchase within his reach, and then claim protection as an innocent purchaser. Eldredge v. Jenkins, 3 Story, 181. Although, when a party to a contract places a known trust and confidence in the other party, and acts upon his opinion, any misrepresentation by the party confided in, in a material matter constituting an inducement to the act of the other party, and by which an undue advantage is taken, will be treated with severity, and regarded as a fraud. Shaeffer v. Sleade, 7 Blackf., 178. But no misrepresentation can have the effect of barring the rights of a party, unless another person is injured thereby, by being induced to part with his property, or unless it be so gross as to amount to proof of fraud. Stuart v. Luddington, 1 Rand., 463; see Morgan v. Bliss, 2 Mass., 112; Fuller v. Hogdon, 25 Me., 243; Ide v. Gray, 11 Verm., 616; Farrar v. Alston, 1 Dev., 69. Misrepresentations may arise where a party makes a statement which is literally true, but substantially false Corbett v. Brown, 8 Bing., 33; 1 Moore & Scott, 85. In this case the defendant's son, having purchased goods from the plaintiffs on credit, they wrote to the defendant requesting to know whether his son had, as he stated, £300 capital, his own property, to commence business with; to which the defendant replied that his son's statement as to the £300 was perfectly correct, as the defendant had advanced him the money. It was proved that, at the time of the advance, the defendant had taken a promissory note from the son for £300, payable on demand, with interest, which interest was paid. Six months after this communication to the plaintiffs, the defendant's son became bankrupt. Held, that it was properly left to the jury to say whether the representation made by the defendant was false within his own knowledge, and, the jury having found a verdict for him, the court granted a new trial. Denny v. Gilman, 26 Me., 149, is a case of the same kind. See, also, Allen v. Addington, 7 Wend., 9; Ward v. Center, 3 John.'s R., 271; Upton v. Vail, 6 id., 181; Barney v. Dewey, 13 id., 224, 395.

statement actually untrue: secondly, the making of that statement by a party to the contract: thirdly, the condition of mind of the person making the statement as to its truth or untruth: fourthly, the intent in the party making the statement to induce the other party to enter into the contract: fifthly, the reliance on the statement by the party to whom it is made: sixthly, the statement having such a relation to the contract as that the statement being false makes the contract unconscionable.

§ **626**. It will be desirable to discuss these points separately; and, in doing so, it must be remembered that it makes a material difference whether the misrepresentation in question is alleged by way of defense to an action for specific performance, or to a common law action on the contract, or as the ground for an action of deceit, or for the rescission of the contract; for somewhat less than the ingredients requisite for either of the two latter proceedings (*c*) will suffice to prevent the active interference of the court in specific performance. The object of the present chapter being to consider misrepresentations in relation to specific performance, it is, of course, only incidentally and very partially discussed in any other relation.

§ **627**. A misrepresentation may or may not be a fraud. Where it is false to the knowledge of the person making it, it is a fraud.[1] Where its falsity was not known, it may

(*c*) Attwood v. Small, 6 Cl. & Fin., 232, 395, 444; Lovell v. Hicks, 2 Y. & C., 46, 51; Aberaman Iron Works v. Wickens, L. R. 4 Ch., 101, reversing the decree of Malins, V. C., L. R. 5 Eq., 485. Consider Arkwright v. Newbold, 29 W. R., 455, reversing S. C., 28 id., 828; 49 L. J. Ch., 684.

[1] *Innocent misrepresentation, and asserting a fact without knowledge.*] "The gist of the inquiry is, not whether the party making the statement knew it to be false, but whether the assertion uttered as true was believed by the party to whom it was made to be true, and if false, deceived him to his injury. The consequences of an innocent misrepresentation, if there can be such a thing, must fall on him who was the author of it, on the principle that the acts of even an innocent man shall prejudice him, rather than a stranger equally innocent." Gibson, Ch. J., in Tyson v. Passmore, 2 Pa. St., 122. Where a party makes a representation as true, and has no positive knowledge as to its truth or falsity, he is guilty of reckless negligence, and if another party is misled he is responsible. Pulsiford v. Richards, 17 Beav., 87; Reese v. Wyman, 9 Ga,, 439; Hunt v. Moore, 2 Pa. St., 105; Smith v. Richards, 13 Pet., 26; Hough v. Richardson, 3 Story, 659; York v. Gregg, 9 Tex, 85; Turnbull v Gadsden, 2 Strobh. Eq., 14; Tayman v. Mitchell, 1 Md. Ch., 496; Lewis v. McLemore, 10 Yerg., 206; Thompson v. Lee, 31 Ala., 292; Oswold v. McGehee, 28 Miss., 340; Bennett v. Judson, 21 N. Y., 238; Phillips v. Hollister, 2 Coldw., 269; Beebe v. Young, 14 Mich., 136; Gunly v. Sluter, 44 Md., 237; Frenzell v. Miller, 37 Ind., 1; Elder v. Allison, 45 Ga., 13.

The truth may be so stated as to be a misrepresentation.] The exact truth may

have been carelessly made, or even in perfect innocence: and yet the fact that the statement was false may render it unconscionable in the person who made the statement to enforce the contract which it produced.

§ **628**. (1) The first point calls for little remark. It is obvious that, to constitute misrepresentation, there must be a statement, and that statement must be untrue.

§ **629**. Mere silence is, generally speaking, neither misrepresentation nor fraud; and, as will be shown in the next chapter, it is quite open to a vendor or purchaser to maintain such silence, though its effect may be that the other party acts under a misapprehension.

§ **630**. The statement must be untrue: and in determining this question, it will not suffice to show that the language used might admit of a meaning which would make it correct.(*d*) It must, it is conceived, be held to be untrue wherever it is found that the speaker intended or expected the hearer to accept it in a sense in which it would not be true.[1]

(*d*) Clarke v. Dickson, 6 C. B. (N. S.), 453.

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be a misrepresentation, where it is known that it is calculated to mislead a party; as, for example, where it was asserted that there was plenty of water upon the property, which was in fact true at the time, but the supply depended not upon natural supply but upon artificial works which might fail. Kerr on Fraud and Mis., 92; Edwards v. Wickwar, L. R. 1 Eq., 68; Colely v. Gadsden, 15 W. R., 1185; Ross v. Estates Ins. Co., L. R. 3 Eq., 135; Chester v. Spayo, 16 W. R., 576; New Brunswick R. R. Co. v. Congbeare, 9 H. of Lds., 711; Legge v. Crocker, 1 Ba. & Be., 506.

[1] *Rule with regard to facts known to vendor.*] All the incidents to which the property is subject must be laid before the purchaser by the vendor, and it must be in language intelligible to a common understanding. The purchaser must not understand ambiguous terms at his peril. Conyers v. Ennis, 2 Mass., 236; Sheard v. Venables, 36 L. J. Ch., 922; Drysdale v. Mace, 5 De G. M. & G., 107; Swaisland v. Dearsley, 29 Beav., 430. The concealment must have been such as to have prevented the other party, had the true facts been known, from entering into the contract. Haywood v. Cope, 25 Beav., 140; Young v. Bumpass, Freem. (Miss.), Ch., 241; Jonzin v. Toulmin, 9 Ala., 352; Baglebole v. Walters, 3 Camp., 154; Schneider v. Heath, 3 id., 506; Pearett v. Shambhut, 5 Miss., 323; Steele v. Kinkle, 3 Ala., 352.

Material facts concealed.] The purchaser, at the time of making the bargain, was ignorant of a substantial defect with respect to the nature of the property, and in regard to which he was not put upon inquiry. Held, that where the defect was substantial, and referred to the nature, character, situation, extent or quality of the property, specific performance would not be decreed. Ellicott v. White, 43 Md., 145.

The words "more or less."] These words cannot be a cover for misrepresentation. King v Knapp, 59 N. Y., 462.

Part of premises purchased fraudulently omitted from deed.] A portion of the estate purchased was fraudulently omitted from the deed given, and the purchaser, being deceived, paid the price, and went into possession under the deed,

§ 631. (2) The statement which is relied on as a misrepresentation must have been made by a party to the contract or his agent, and not by a stranger. "If," said Lord Romilly, M. R., "a third person, by representing to A. that it will be highly for his benefit, and by false representations induces him to enter into a contract with B., but B. makes no false representation, and is neither party or privy to any such, then the contract is valid, and stands good in this court. But the person who, by false representations, induced the other to enter into that contract is liable, in an action, to make good to the person he has misled the damage he has sustained by acting on the misrepresentation made to him."(*e*) Duranty's Case (*f*) and Ex parte Worth (*g*) brings this principle into clear relief; for in those cases it has been held that if directors, as agents of the company, issue a false report, and third persons, influenced by this report, contract with the company for shares, the contract may be avoided; but that if the same third persons contract with individual shareholders for shares, the contract cannot be avoided.

§ 632. It is, of course, enough that the agent was appointed to bring about the contract for the principal, and that he made the misrepresentation. It is not needful that he should have been appointed the agent to make the misrepresentation.(*h*)[1] Thus, in the cases in which con-

(*e*) In Duranty's Case, 26 Beav., 270.
(*f*) 26 Beav., 268.
(*g*) 4 Drew., 529.
(*h*) Barwick v. English Joint-Stock Bank, L. R. 2 Ex., 259.
(*i*) See, *e. g.*, Reese River Silver Mining Co. v. Smith, L. R. 4 H. L., 64; cf. Gibson's Case, 2 De G. & J., 275, 283.

Held, that he was not bound to know that the description in the contract and the deed, did not embrace all the land orally agreed to be sold, and that the statute of frauds was no bar to an action for the specific performance. Beardsley v. Duntley, 69 N. Y., 577; Goodenough v. Curtis, 18 Mich., 298; Stewart v. Beard, 23 Iowa, 477.

Rescission of the contract for fraudulent concealment.] Where a party, by fraudulent concealment, or willful perversion of material facts, induces another to enter into a contract, the latter will be entitled to a rescission of such contract. Pollard v. Rogers, 4 Cal., 239; McNiel v. Baird, 6 Munf., 316; Snelson v. Franklin, 6 id., 210; Rawdon v. Blatchford, 1 Sandf.'s Ch., 344.

[1] *Liability of principle for agent's misrepresentations.*] The acts of an authorized agent who, by fraud and false representations, affects a sale of property, even in a case where the fraudulent acts were without the authority or even knowledge of the principle makes such principle legally accountable; it is as if he had done the act himself. New Brunswick R. R. Co. v. Conybeare, 9 H. of Lds., 714, 726; Barwick v. English Joint-Stock B'k, L. R. 2 Ex., 265; Bartlett v. Salmon, 6 De G. M. & G., 39; Bristow v. Whitmore, 9 H. of Lds., 418; Wheelton v. Hardisty, 8 E. & B., 270; Crump v. United States Mining Co., 7 Gratt., 352; Hough v. Richardson, 3 Story, 689; Fitzsimmons v. Joslin, 21 Vt., 129; Henderson v. R. R. Co., 17 Tex., 560; *contra*, Cornfoot v. Fowke, 6 M. & W., 358.

tracts have been rescinded against companies, the representation have been made by the directors, who, of course, have no express authority to make a misrepresentation.(*i*)

§ **633**. (3) As to the state of mind of the person making the statement as to its truth or falsehood; it is to be observed that though there can be no fraud without the knowledge of the untruth of the statement, yet there may well be misrepresentation, *i. e.*, the representation may be erroneous, though not known to be so.

§ **634**. It would lead us over a wide field to consider how far knowledge of the error is essential in actions to rescind a contract, or in actions for deceit, or to support a defense on the ground of fraud or misrepresentation in answer to an action on the contract.(*j*) But it is conceived to be clear that, in equity, a false statement, though believed to be true, if made with a view to a contract by a party to the contract, is a good defense to an action for specific performance. In Wall v. Stubbs,(*k*) Plumer, V. C., observed, "that whether the misrepresentation be willful or not of a fact latent or patent, such misrepresentation may be used to resist a specific performance, unless the purchaser really knew how the fact was."

§ **635**. This point was particularly considered by Lord Hatherley (when V. C.) in Higgins v. Samels,(*l*) in which case the defendant resisted specific performance on the ground of misrepresentation by the plaintiff, and it did not appear that the plaintiff knew the falsity of the statement which he made. His Lordship concluded that it was not necessary to prove that the representation complained of was made with a knowledge that it was false; and, in so concluding, relied on Taylor v. Ashton(*m*) and Evans v. Edmonds.(*n*) The latter case arose on a covenant in a separation deed, to which fraud was pleaded, and Maule, J., said, "I conceive that if a man, having no knowledge whatever on the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril; and, if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is in law guilty of a

(*j*) See on this, at common law, Kennedy v. Panama, etc., Mail Co., L. R. 2 Q. B., 580.
(*k*) 1 Mad., 80.
(*l*) 2 J. & H., 460, 466.
(*m*) 11 M. & W., 401.
(*n*) 13 C. B., 777.

fraud, for, he takes upon himself to warrant his own belief of the truth of that which he so asserts."(*o*) Indeed, executed contracts have been rescinded on the ground of their having been induced by false statements which were believed to be true by the persons making them.(*p*)

§ **636**. Questions of considerable nicety have been raised at common law as to the effect of the misrepresentation by an agent, where the principal is innocent and neither authorized nor knew of the misstatement. It has been discussed whether such misrepresentations render the principal liable in an action for deceit.(*q*) It has, in a celebrated case, been held, that where an agent, without designing to deceive, made a representation which was false, but which he did not know to be so, whilst the principal had the knowledge of the actual facts, but did not make the representation, there was no evidence to support a plea of fraud or covin.(*r*)[1]

§ **637**. But as an innocent misrepresentation by a party to the contract is a bar to his seeking specific performance of it, such questions do not seem to arise in actions of this

(*o*) 13 C. B., 786. See, also, Peek v Gurney, L. R. 6 H. L., 377.

(*p*) Rawlins v. Wickham, 3 De G. & J., 304 (as regards the deceased partner); Hart v. Swaine, 7 Ch. D., 42. Distinguish Brett v. Clowser, 5 C. P. D., 376; and cf. per Lord Selborne in Brownlie v. Campbell, 5 App. C., 938.

(*q*) Udell v. Atherton, 7 H. & N., 172; Barwick v. English Joint-Stock Bank, L. R. 2 Ex., 259.

(*r*) Cornfoot v. Fowke, 6 M. & W., 358; discussed and explained in The National Exchange Co. v. Drew, 2 Macq., 103; and see Barwick v. English Joint-Stock Bank, L. R. 2 Ex., 259. See, also, Fuller v. Wilson, 3 Q. B., 58; and in Cam. Scac. as Wilson v. Fuller, 3 id., 68, which was an action for deceit, ultimately decided on the ground that the cause of the injury was the plaintiff's own misapprehension; and cf. per Lord Hatherley in Brownlie v. Campbell, 5 App. C., 941.

[1] Young v. Covell, 8 John.'s R., 23, is a case precisely in point. It was there said by the court that an action of this nature "cannot be maintained without proving actual fraud in the defendant, or an intention to deceive the plaintiff by false representation. The simple fact of misrepresentation, unconnected with fraudulent design, is not sufficient. The evidence produced by the plaintiffs at the trial did not make out the fraud, or show enough to justify the jury in drawing the conclusion. The defendant made no representation of facts within his knowledge. He stated correctly the circumstances of the connections of Davis in Rhode Island. He lived on friendly terms with the plaintiffs; he gave them prompt and reasonable notice of his subsequent opinion of the insolvency of Davis; and it did not appear that he had any connection with Davis, or that he came and voluntarily recommended him to the plaintiffs. The advice was rash and indiscreet; but there is no ground from which to infer that it was deceitful. *Deceit* is the gist of the action. If the case had gone to the jury, the testimony would not have warranted a verdict for the plaintiffs, and the motion to set aside the nonsuit ought, therefore, to be denied." In the older case of Ward v. Center, 3 John., 271, this point was treated as unsettled, though the court seems to have inclined to the view taken afterwards in Young v. Covell. Of course, where there exists the *deceit* or fraudulent design, said to be the gist of the action, the complaint is well laid. Gallagher v. Mason, 6 Cow., 346; Benton v. Pratt, 2 Wend., 385; Upton v. Vail, 6 John., 181.

nature; for it seems clear that any misrepresentation of an agent leading up to the contract, though both principal and agent were innocent, would debar the principal from specific performance.[1]

§ **638**. It may probably be laid down as a general principle in equity, that a man is bound who makes a representation which is not true, though without knowledge of its untruth, and this even though the mistake be innocent; for a man, before making a representation, ought not only not to know it to be untrue, he ought to know that it is true.(*s*) So, in a case where a trustee was charged by the court in respect of a misrepresentation made to a purchaser, and the trustee alleged that he did not, at the time, recollect the fact thus misrepresented, Grant, M. R., said, "the plaintiff cannot dive into the secret recesses of his (the trustee's) heart, so as to know whether he did or did not recollect the fact, and it is no excuse to say that he did not recollect it."(*t*)[2] In like manner, it may be added that, in the cases of agents rendering themselves personally liable, it is the

(*s*) Ainslie v. Medlycott, 9 Ves., 13, 21.
(*t*) In Burrowes v. Lock, 10 Ves., 476; accordingly Price v. Macaulay, 2 De G. M. & G., 339; and see per Lord Selborne in Brownlie v. Campbell, 5 App. C., 935, 936.

[1] *Rule with respect to good faith.*] "It is equally promotive of good morals, fair dealing and public justice and policy, that a vendor should distinctly comprehend not only that good faith should reign over all his conduct in relation to the sale, but that there should be the most scrupulous good faith, an exalted honesty, or, as it is often felicitously expressed, *uberrima fides*, in every representation made by him as an inducement to the sale. He should literally, in his representation, tell the truth, the whole truth, and nothing but the truth. If his representation is false in any one substantial circumstance going to the inducement or essence of the bargain, and the vendee is thereby misled, the sale is voidable, and it is wholly immaterial whether the representation be willfully or designedly false, or ignorantly or negligently untrue. The vendor acts at his peril, and is bound by every syllable he utters or proclaims, or knowingly impresses upon the vendee, as a lure or decisive motive for the bargain." Story, J., in Doggett v. Emerson, 3 Story, 733; Hough v. Richardson, id., 659.

Misrepresentation made in good faith.] A party misrepresented the law to his sister-in-law, and she, believing her title to property held by her not to be good, sold it to him, the sale being greatly to his advantage. Held, that such sale would be annulled, even where the misrepresentations were made in good faith, and in a mistaken idea of the law. Sims v. Farrill, 45 Ga., 585.

[2] A mortgage obtained by the misrepresentations of the mortgagee is void: and it is immaterial as to its legal effect upon the instrument, whether the mortgagee, at the time he made the representation, knew it to be false. If he made a statement of facts, knowing it to be false, it would clearly be a legal fraud; but although he did not know it to be false, yet if he undertook to state it as true, without a knowledge of its truth or falsehood, and it operated as a deception on the party to whom it was made, and thereby induce the mortgage, it would avoid it. The gist of the inquiry is not whether the party making the

same whether they represent what they know to be false, or what they do not know to be true.(*u*)[1]

§ **639**. (4) The misrepresentation must have been made in relation to the contract in question, and with a view to induce the other to enter into it; it must have been *dolus dans locum contractui*.(*v*) Hence, unless under very special circumstances, it must have been made at the time of the treaty,(*w*) and not have relation to some collateral matter, or other relation or dealing between the parties.(*x*)[2]

(*u*) Per Alderson, B., in Smout v. Ilbery, 10 M. & W., 10.

(*v*) See per Lord Brougham in Attwood v. Small, 6 Cl. & Fin., 444; per Lord Wensleydale in Smith v. Kay, 7 H. L. C., 775.

(*w*) Per Leach, V. C., in Harris v. Kemble, 1 Sim., 122. As to the question whether a representation by an insurance company in a published prospectus can be presumed in the absence of specific evidence to have been the basis of an insurance effected with them, see Wheelton v. Hardisty, 8 El. & Bl., 232.

(*x*) Harris v. Kemble, 1 Sim., 111, 128, overruled, but as to the application and not as to the principle, 5 Bli. (N. S.), 730. See, also, Dawes v. King, 1 Stark., 75.

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statement knew it to be false, but whether the statement made as true was believed, and, therefore, if false, deceived the party to whom it was made. Jones v. Taylor, 6 Gill & John., 54. In Donelson v. Youngs, Meigs, 155, where a machinist sold a machine made by himself, which was wholly worthless, representing it to be a good one, it was held to be a fraud, although the vendor was, through want of skill in his business, ignorant that the machine was not a good one. But it is said that a misrepresentation of the solidity of a mercantile house, made under a mistake of fact, without any interest or fraudulent intention, will not sustain an action, although the plaintiff may have suffered damage by reason of such misrepresentation. Russell v. Clark 7 Cranch, 69.

[1] A person who falsely states a matter within his knowledge, is not excused by averring a want of recollection at the time of the statement. Kent, Ch., Bacon v. Bronson, 7 John.'s Ch., 164.

[2] Willard's Eq. Jur., ch. 3, p. 149; Story's Eq. Jur., § 195. The case of Taylor v. Fleet, 1 Barb. Sup. Ct. R., 471, is an authority of value on this point. A person about to purchase a farm was ignorant of the actual character and capabilities of the land, and had no means of obtaining such knowledge, except by information derived from others; and the owner, with a knowledge that the purchaser's object was to obtain an early farm, and that his farm was not so early as others lying in the neighborhood, represented to such purchaser "that there was no earlier land anywhere about there," and the latter relying upon the truth of such representation, made the purchase; and after ascertaining, by actual experiment, that the land was not what it had been represented to be, he applied to the vendor, within a reasonable time, to rescind the bargain, who refused to do so. Held, that this furnished a sufficient ground for the interference of a court of equity to rescind the contract, even though there was no intention on the part of the vendor to deceive the purchaser. In delivering the opinion of the court, Harris, J., said that a misrepresentation of a material fact, constituting the basis of the sale, and relied upon by the purchaser, is sufficient to warrant the interference of the court. In Camp v. Pulver, 5 Barb., 91, the importance of the materiality of the misrepresentation is dwelt upon by the court. Harris, P. J. See Halls v. Thompson, 1 S. & M., 443.

Misrepresentation without a design is not sufficient for an action, but if recommendation of a purchaser as of good credit, to the seller, be made in bad faith, and with knowledge, that he was not of good credit, and the seller sustain damage thereby, the person who made the representation is bound to indemnify the seller. 2 Kent's Com., 490. This rule places the liability of the defendant upon the true ground, exonerating him where he may act in good faith and still err in his judgment, and rendering him responsible where he knowingly

§ **640**. This point was much discussed in a Scotch case in the House of Lords. There, a tottering joint-stock company had put out flourishing annual reports of its condition, and shortly after the last of these reports, and with a view to prevent its shares falling in the market and to counteract certain unfavorable rumors, the company, through their manager, urged the defenders to purchase additional shares in the concern, and assured them that the company would advance the necessary funds, and that the stock should be held until it could be sold at a profit, without the defenders being called on to pay any money: the shares became valueless, and the company sued for the money advanced, to which the defenders pleaded the fraud of the company: to this plea it was, amongst other things, objected that the loan was one independent transaction, and the purchase another, and that the alleged misrepresentation in the purchase did not vitiate the loan. But it was held by their lordships that the defense was good, Lord Cranworth putting it on the ground that the transaction did not constitute a loan in the ordinary sense of the word, but a special contract by the company to purchase for the defenders, to be repaid only in a particular manner; and Lord St. Leonards holding that the purchase and the loan were one transaction, though consisting of two parts—that if there had been no loan there would have been no purchase, and if there had been no purchase there would have been no loan.(*y*)

§ **641**. On the other hand, it has been held by the House of Lords that a purchaser of shares in the market, upon the faith of a prospectus which he has not received from its authors, cannot so connect himself with them as to render them liable for the misrepresentation contained in it.(*z*) In

(*y*) The National Exchange Co. v. Drew, 2 Macq., 103.

(*z*) Peek v. Gurney, L. R. 6 H. L. 377. See, too, Barry v. Croskey, 2 J. & H., 1; and consider Barrett's Case, 3 De G. J. & S., 30.

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misinforms the applicant for the purpose of deceiving him." Daniels, J., in Marsh v. Falker, 40 N. Y., 567.

Statements claimed to be false, must have been acted upon.] In order that equity may interfere, the misrepresentation complained of must have induced the party to contract to his damage. The injured party must have had a right to rely upon the statements made. Graffenstein v. Epstein, 23 Kan., 443.

Waiver of misrepresentations.] Where a party enters into new stipulations, he waives a former misrepresentation thereby. Thureatt v. McLeod, 56 Ala., 375.

earlier cases it had been held, that a report published by the directors of a company as addressed to its shareholders, but intended to come and coming into the hands of any person who might wish to purchase shares, was a representation made by the directors to any person who might obtain the report and on the faith of it buy shares;(*a*) and that false representations made by the directors of a company to the secretary of the stock exchange to obtain an official quotation justified a person who, knowing the rules of the exchange, had bought on the faith of the quotation so obtained, in suing the directors in damages:(*b*) but in Peek v. Gurney,(*c*) Lord Chelmsford, while not doubting the propriety of the former of these two cases, expressed strong dissent from the latter.

It need hardly be said that if, in any case where an action for deceit would lie, the result of the misrepresentations had been a contract between a director and one of the public, and the director had sued the purchaser in specific performance, the purchaser would have had a clear defense.

§ **642**. Where directors as agents of the company prepared false reports and a circular addressed to the shareholders and customers of the bank, and intended for them, and one of the directors took these papers to a person who was neither a shareholder nor a customer, and thereby induced him to become a shareholder, it was held that the company were not bound, on the two grounds, (1) that the authority was given to the directors as a body and not to each one individually, and (2) that the paper was prepared for one purpose and applied by an individual director for another.(*d*)

§ **643**. (5) Another circumstance essential to misrepresentation as a defense to specific performance is, that it was in reliance upon the statements in question that the party to whom they were made entered into the contract. In Attwood v. Small,(*e*) which was a case for the rescission of the contract (and for this point the plaintiff's case for rescission and the defendant's case against specific performance seem alike), Lord Brougham, after referring to the earlier

(*a*) Scott v. Dixon, 29 L. J. Ex., 62 n.
(*b*) Bedford v. Bagshaw, 4 H. & N., 538. See, also, Clarke v. Dickson, 6 C. B. (N. S.), 453.
(*c*) L. R. 6 H. L., 397, 398.
(*d*) Nicol's Case, 3 De G. & J., 387. Consider Barrett's Case, 3 De G. J. & S., 30.
(*e*) 6 Cl. & Fin., 447.

cases, said, "Now, my lords, what inference do I draw from these cases? It is this, that general fraudulent conduct signifies nothing; that general dishonesty of purpose signifies nothing; that attempts to overreach go for nothing; that an intention and design to deceive may go for nothing, unless all this dishonesty of purpose, all this fraud, all this intention and design, can be connected with the particular transaction, and not only connected with the particular transaction, but must be made to be the very ground upon which this transaction took place, and must have given rise to this contract."

§ **644**. It is not, of course, necessary that the statements which were false should have been the sole inducements to the contract. The presence of true statements will not remove or cancel the effect of false ones.(*f*)[1]

§ **645**. In considering whether the defendant relied on the misrepresentation of the plaintiff, the court will discriminate between such representations as are in conscience a part of the bargain, whether incorporated into the legal contract or not, and mere vague commendations, as the holding out of mere hopes or expectations which ought to put the other party upon further inquiry; and in judging of this, it is important to consider whether the thing stated may lie in the knowledge of the party making the representation, or whether it must lie beyond his knowledge. Thus, for instance, with regard to mines, a distinction will be drawn between a specific account of what was to be seen in the mine, and a general description of its prospects and

(*f*) Clarke v. Dickson, 6 C. B. (N. S.), 453; Nicol's Case, 3 De G. & J., 387.

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[1] Allen v Addington, 7 Wend., 9; Young v. Hall, 4 Geor., 95. If a party makes false affirmation, although he has no interest of his own to serve, whereby another sustains damage, he is liable to an action. Beam v. Herrick, 3 Fairf., 262; see Stiles v. White, 11 Metc., 356.

Rule as to statements false in fact.] "To maintain an action for fraud and deceit, based upon false representations, the representations must not only be false, in fact, but the party making them must believe, or have reason to believe, them to be false, and such false representations must influence the other party to contract." Grover, J., in Oberlander v. Spiers, 45 N. Y., 175; Meyer v. Amidon, id., 169; Marsh v. Falker, 40 id., 566; Smith v. Coe, 29 id., 666; Bennett v. Judson, 21 id., 238; Carman v. Pultz, id., 547; see, also, Earley v. Garrett, 9 B. & C., 928; Freeman v. Baker, 5 B. & Ald., 797; Thorn v. Bigland, 8 Exch., 726; Bartlett v. Solomon, 6 De G. M. & G., 33; Moens v. Heyworth, 10 M. & W., 147; Collins v. Evens, 5 Q. B., 820; Heycraft v. Creasy, 2 East., 92; Oswood v. Huth, 14 M. & W., 651; Burrows v. Lock, 10 Ves., 470; Brooks v. Hamilton, 15 Minn., 26; Stitt v. Little, 63 N. Y., 427.

capabilities, which from the very nature of the property must be problematical and doubtful.(*g*) So, again, the misrepresentations relied on must be statements of alleged facts and not mere expressions of opinion.[1]

§ **646**. Accordingly, where an advowson was sold by auction, and the particulars stated that a voidance of the preferment was likely to occur soon, but made no mention of the present incumbent, and the auctioneer at the sale stated in explanation that the living would be void on the death of a person aged eighty-two; and in fact the then incumbent was only thirty-two years of age: Grant, M. R., held the

(*g*) Jennings v. Broughton, 17 Beav., 234; 5 De G M. & G., 126; cf. Jefferys v. Fairs, 4 Ch. D., 448.

[1] *Where the false statements presumably produced no effect.*] "If the party to whom the representations were made, himself resorted to the proper means of verification before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon the representations made to him by the other party. Or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the results, which, upon due inquiry, he ought to have obtained, and thus the motion of reliance on the representations made to him be excluded. Again, when we are endeavoring to ascertain what reliance was placed on representations, we must consider them with reference to the subject matter and relative knowledge of the parties. If the subject is capable of being accurately known, and one party is, or is supposed to be, possessed of accurate knowledge, and the other is utterly ignorant, and a contract is entered into after representations made by the party who knows, or is supposed to know, without any means of verification being resorted to by the other, it may well enough be presumed that the ignorant man relied on the statements made to him by him who was supposed to be better informed. But if the subject is in its nature uncertain, if all that is known about it is matter of inference from something else, and if the parties making and receiving representations on the subject have equal knowledge and means of acquiring information and equal skill, it is not easy to presume that representations made by one would have much, or any, influence on the other." Lord Langdale, in Chapham v. Shillito, 7 Beav., 146; see, also, Pike v. Vigers, 2 D. & W., 261; Vesey v. Doto, 3 Allen, 380; Clarke v. Macintosh, 4 Giff., 134; Hough v Richardson, 3 Story, 659; Small v. Atwood, 6 Cl. & Fin., 232. Their inspection, if the purchaser does not avail himself of those means and opportunities, he will not be heard to say in impeachment of the contract of sale, that he was drawn into it by the vendor's misrepresentations." This is the rule as laid down by the United States Supreme Court in Slaughter's Admin. v. Gerson, 13 Wall., 383; see, also, Davis v. Sims, Hill & Denio, 234; Sun Ins. Co. v. Adam, 23 Pick., 256; Mooney v. Miller, 102 Mass., 220; Long v. Warren, 68 N Y., 426; Tallman v. Green, 3 Sandf., 437; Smith v. Countryman, 30 N. Y., 681; Grant v. Munt, Cooper, 173; Barnett v. Stanton, 2 Ala., 181; Buck v. McCaughtrey, 5 Monr., 216; Reading v. Price, 3 J. J. Marsh., 61; McKinny v. Fort, 10 Tex., 220; Barron v. Alexander, 27 Mo., 530; Cauldwell v. McClelland, 3 Sneed, 150

Representations as to property at a distance.] Where property is sold which the purchaser has never seen, and is obliged to depend upon the statements of the vendor respecting it, such vendor is bound to stand his representation. Re Reese River Silver Mining Co., L. R., 2 Ch., 614; Spalding v. Hedges, 2 Pa. St, 240; Smith v. Richards, 13 Pet., 26; Camp v. Camp, 2 Ala., 632; Babcock v. Case, 61 Pa. St., 427; Miner v. Medbury, 6 Wis., 295.

representation made by the particulars so vague and indefinite that its only effect ought to have been to put the defendant upon making inquiries, and accordingly granted specific performance.(*h*) And so, again, the representation that land was uncommonly rich water-meadow, whereas, in fact, it was very imperfectly watered, was held not to be a bar to performance:(*i*)[1] and the like was held as regards a statement to the effect that the land in course of time might be covered with warp and considerably improved at a moderate cost.(*j*)

§ **647**. But, generally speaking, in statements made by the vendor as to property, he is bound to make them free from all ambiguity, and "the purchaser is not bound to take upon himself the peril of ascertaining the true meaning of the statement:"(*k*) and in all cases of commendation by the vendor, a specific statement as to the character of the thing sold is to be distinguished from general laudation. The statement that a lime which would be produced by stone to be got in an unopened field would be of a particular quality, was held sufficiently precise to furnish a defense.(*l*)[2]

§ **648**. Besides the vagueness of the representation, there are other grounds upon which the court will conclude that it was not relied upon by the party to whom it was made: these were discussed by Lord Langdale, M. R., in the case

(*h*) Trower v. Newcome, 3 Mer., 704.
(*i*) Scott v. Hanson, 1 Sim., 13; S. C., 1 R. & My., 128. See, also, on this point Fenton v. Browne, 14 Ves., 144; Brealey v. Collins, You., 317; Brooke v. Roundthwaite, 5 Ha., 298.
(*j*) Dimmock v. Hallett, L. R. 2 Ch., 21.
(*k*) Per Lord St. Leonards in Martin v. Cotter, 3 Jon & L., 507; Wall v. Stubbs, 1 Mad., 80. See, too, Moxey v. Bigwood, 4 De G. F. & J., 351; Caballero v. Henty, L. R. 9 Ch., 447.
(*l*) Higgins v. Samels, 2 J. & H., 460. See, too, Colby v. Gadsden (*caveat emptor*), 34 Beav., 416

[1] It is undoubtedly true that to avoid a contract on the ground of misrepresentation, there must not only be a misrepresentation of a material fact constituting the basis of the sale, but the purchase must have been made upon the faith and credit of such representations. At least, the purchaser must so far have relied on them as that he would not have made the purchase if the representations had not been made." Taylor v. Flett, 1 Barb. Sup. Ct. Rep., 475. Although other inducements besides the representations may have operated in the giving credit, it is enough if the vendor is *moved* by such representations, so that without it the goods would not have been parted with. Addington v. Allen, 11 Wend., 375.

[2] There is also a distinction taken at law, between the mere expression of an opinion and the statement of a fact. Pars. Contr., vol. 2, pt. 2, ch. 3, p. 275, and note (*j*). But it is added, by the same author, that this distinction must not be carried too far; and that if the opinion was one on which the other party was justified in relying, either by the relations existing between the parties, or by the nature of the case, and it can be made to appear that the opinion expressed was not in fact held, that this should be deemed equivalent to a misrepresentation of facts.

of Clapham v. Shilton.(*m*) His lordship there said: "Cases have frequently occurred in which upon entering into contracts misrepresentations made by one party have not been, in any degree, relied on by the other party. If the party to whom the representations were made himself resorted to the proper means of verification, before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon the representations made to him by the other party: or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded. Again, when we are endeavoring to ascertain what reliance was placed on representations, we must consider them with reference to the subject matter and the relative knowledge of the parties. If the subject is capable of being accurately known, and one party is, or is supposed to be, possessed of accurate knowledge, and the other is entirely ignorant, and a contract is entered into after representations made by the party who knows, or is supposed to know, without any means of verification being resorted to by the other, it may well enough be presumed that the ignorant man relied on the statements made to him by him who was supposed to be better informed: but if the subject is in its nature uncertain—if all that is known about it is matter of inference from something else, and if the parties making and receiving representations on the subject have equal knowledge and means of acquiring knowledge, and equal skill, it is not easy to presume that representations made by one would have much or any influence upon the other."(*n*)

§ **649**. It must not from this be inferred that the mere presence of the means of detecting the misstatement prevents the deceived person from relying on it.(*o*) If a statement be made by A. to B. and the means of verification be offered, B. may rely on the statement and refuse the investi-

(*m*) 7 Beav., 146.
(*n*) 7 Beav., 149, 150.
(*o*) Central Railway Co. of Venezuela v. Kisch, L. R. 2 H. L., 99; affirming S. C., 3 De G. J. & S., 122.

gation: but if he accept the investigation and find or might have found the statement false, he cannot afterwards allege that he relied on the statement: for in fact he did not.

§ **650**. He who, because he does not rely on what is stated to him, resorts to other means of knowledge, cannot afterwards say that the misrepresentation was what he relied on. "If," said Lord Holt, C. J., alluding to the circumstances of the case before him, "the vendor gives in his particular of the rents, and the vendee says he will trust him and inquire no further, but rely upon his particular; then, if the particular be false, an action will lie; but if the vendee will go and inquire further what the rents are, there it seems unreasonable he should have any action, though the particular be false, because he did not rely upon the particular."(*p*) It was on this ground that the House of Lords ultimately decided the celebrated case of Attwood v. Small.(*q*) The British Iron Company had sent a deputation of their directors down to Mr. Attwood's works for the express purpose of verifying his representations, and they expressed their satisfaction with the proofs produced: by this line of conduct they precluded themselves from being able to rely on any previous misrepresentations: for if a purchaser chooses to judge for himself, and does not avail himself of all the knowledge and means of knowledge open to him, he will not afterwards be allowed to say that he was deceived by the representations of the vendor. This decision was given in a suit for rescission, and not upon a defense to a specific performance; but for the present point these seem to be alike.(*r*)

§ **651**. The principle is further illustrated by the case of Jennings v. Broughton,(*s*) where the plaintiff, having bought shares in a mine, afterwards sought to set aside the sale on the ground of misrepresentation as to the state of the mine; but he having visited the mine himself, and the alleged misstatements being such as he was competent to detect, the court held that his purchase of shares had not been made in reliance on the representations, and the bill was dismissed both by Lord Romilly, M. R., and the court of appeal in

(*p*) Lysney v. Selby, 2 Lord Raym., 1118, 1120.
(*q*) 6 Cl. & Fin., 232.
(*r*) Cf. Aberaman Iron Works v. Wickens, L. R. 4 Ch., 101; reversing S. C., L. R. 5 Eq., 485; Farebrother v. Gibson, 1 De G. & J., 602
(*s*) 5 De G. M. & G., 126; affirming S. C., 17 Beav., 234.

chancery. "I desire," said Knight Bruce, L. J., "to be understood as at once giving my opinion against the plaintiff with regard to every 'object of sense' which on either visit to the mine he may, as an educated man of ordinary intelligence, having the use of his eyes, his mind on the alert and his interest awakened, be reasonably taken (whether much or little of a workman or a philosopher) to have observed."(*t*) With this last mentioned case may advantageously be brought into comparison the case of Higgins v. Samels,(*u*) where the representation was as to the character of the lime which could be made from the stone under a field, and where after this statement the defendant and two friends made a cursory inspection of the field in company with the plaintiff, and it did not appear that any of the persons were competent to judge by inspection of the quality of the stone for the purpose of lime burning. In this case Lord Hatherley (then V. C.) considered that the inspection did not preclude the defendant from relying upon the misrepresentation.

§ **652**. Where a purchaser complained of a representation that the woods sold had yielded £250 per annum on an average of fifteen years, on the ground that though they might in fact have done so, yet that they would not have done so in a fair course of husbandry, his objection was held to be displaced by proof that he had been put in possession of a paper from which he might have ascertained that the woods had been unequally cut.(*v*)

§ **653**. The allegation of misrepresentation may also be effectually met by proof that the party alleging it was from the beginning cognisant of all the matters complained of,(*w*) or after full information concerning them continued to act on the footing of the contract, or to deal with the property comprised in it as if held under the contract: as, for instance, where a lessee of a mine, after knowledge of alleged misrepresentation, continued to work it.(*x*)[1]

(*t*) 5 De G. M. & G., 131. See, also, Haywood v. Cope, 25 Beav., 140, and Jefferys v. Fairs, 4 Ch. D., 448.

(*u*) 2 J. & H., 460.

(*v*) Lowndes v. Lane, 2 Cox, 363. See, too, Clarke v. Mackintosh, 4 Giff., 134; 11 W. R., 652.

(*w*) Cf. Nene Valley Drainage Commissioners v. Dunkley, 4 Ch. D., 1, where misdescription was alleged.

(*x*) Vigers v. Pike, 8 Cl. & Fin., 562, 650; Hume v. Pocock, L. R. 1 Eq., 423; 1 Ch., 379.

[1] At law, subsequent performance on the part of the one defendant, with knowledge of the fraud acquired subsequently to the making of the agreement,

§ **654**. Whether a misrepresentation not of fact, but of law, would afford a defense to an action for specific performance has not, it is believed, been decided.(*y*) But for the purposes of holding a defendant liable to make good a representation, or of rescinding a contract, it is certain that it must be a statement not of law, but of fact.(*z*) Every one is taken to know the law.[1]

§ **655**. Questions of title are mixed questions of law and fact: but where the vendors knew of a fact which destroyed their title to a material part of the property sold (viz.: the fact that it was a recent encroachment from a common), and, nevertheless, represented that they were the owners in fee simple or had free power to dispose of the inheritance of the whole of the property sold, and the abstract they delivered did not disclose the material fact, it was held by Grant, M. R., and Lord Eldon that a bill for rescission could be maintained. This was the case of Edwards v. M'Leay.(*a*)

§ **656**. But it must not thence be inferred that every representation that the vendor has a good title will enable the purchaser to set aside an executed contract or successfully resist specific performance.(*b*)

§ **657**. The authority of Edwards v. M'Leay was followed and relied on by Knight Bruce, V. C., in the celebrated case of Gibson v. D'Este,(*c*) in which he decided that the knowledge in the vendor or her agent of a right of way over the property sold of which the purchaser was not aware, and which was not stated to him by the vendor or her agent, was a ground for the rescission of the contract. This decision was, however, overruled by the House of Lords, on the

(*y*) See infra, § 765 et seq.
(*z*) Beattie v. Lord Ebury, L. R. 7 Ch., 777; affirmed in D. P. L. R. 7 H. L., 102; Legg v. Croker, 1 Ball & B., 506
(*a*) Coop., 308; 2 Sw., 287; St Leon. Law of Prop., 649. See Turner v. West Bromwich Union, 9 W. R., 155; Hart v. Swaine, 7 Ch. D., 42, 47.
(*b*) Legge v. Croker, 1 Ball & B., 506; Hume v. Pocock, L. R. 1 Eq., 423; 1 Ch., 379; Brownlie v. Campbell, 5 App. C., 925, 937. Cf. Brett v. Clowser, 5 C. P. D., 376.
(*c*) 2 Y. & C. C. C., 542.

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and prior to its performance, precludes him from the disaffirmance of the contract; or suit for the consideration, but does not bar him of his remedy for damages. Whitney v. Allaire, 4 Denio, 554.

[1] *The representation must be of matter of fact*, and not of a matter of law, opinion, judgment or mere intention, unless the expression of opinion constitutes a warranty, or that of intention or contract; or unless, in dealing with another, an unconscionable advantage is taken of his ignorance of his legal rights. Adam's Equity, 176; see, also, Leake on Con., 182; Kerr on Fraud and Mis., 90; Curry v. Keyser, 39 Ind., 214; Colter v. Morgan, 12 B. Mon., 278; Townsend v. Coales, 31 Ala., 428.

principle that, in order to set aside a purchase perfected by conveyance and payment of the purchase money, there must be proof of the direct personal knowledge and concealment by the principal, and not merely by an agent, and that such proof was wanting in the case.(*d*) This decision has by no means given universal satisfaction,(*e*) but whether correct or not, it leaves intact the doctrine established in Edwards v. McLeay.

§ **658**. Where a misrepresentation has been made by the vendor with regard to some patent defect in the thing sold, and it is proved that the purchaser had seen the thing sold, so that this defect must have been known to him, he will not be able to avail himself of the defect as a bar to specific performance.[1] This was decided by Grant, M. R., in the case of Dyer v. Hargrave,(*f*) where a farm was described as all lying within a ring-fence, whereas it did not in fact so lie; but it was clearly proved that the defendant had lived in the neighborhood all his life, had seen the farm before purchasing it, and must have known whether it did lie in a ring-fence or not; and on these facts the master of the rolls decided that the defendant was clearly excluded from

(*d*) Same note, Wilde v. Gibson, 1 H. L. C., 605 See Brownlie v. Campbell, 5 App C., 925, 937; and consider Brett v. Clowser, 5 C. P. D., 376, 388.

(*e*) St. Leon. Law of Prop., 614.

(*f*) 10 Ves., 505. See supra, § 651.

[1] *Each party having an opportunity to examine, and doing so.*] "The rule that when a purchaser has examined property containing defects which can be discovered by ordinary vigilance, he is not entitled to relief on account of such defects, does not apply when fraudulent means have been employed to conceal the defects. The obligation to communicate facts ceases when each party has an opportunity of examining for himself, and undertakes to do, without relying on the statements of the other. But it is not the mere opportunity to examine which relieves the other party from the duty to disclose. For although the opportunity exists, yet if the purchaser is led to repose confidence in the vendor, and does not examine for himself, the duty to disclose defects is equally obligatory, and the vendor will be held bound for all statements and all undue concealments." Sharkey, J., in Hall v. Thompson, 1 Sm. & Marsh., 443.

Purchaser need not give vendor information of inhanced value.] The purchaser is not bound to advise the vendor of a fact which may increase the value of the property. There may be a mine upon the land of vendor, of which he is ignorant, an intending purchaser who is aware of the fact, is not bound to disclose it. The rule appears to be, that the vendor must put the purchaser in possession of any fact which decreases the value of the property; but the purchaser is not reciprocally bound to advise the vendor of a fact which may increase its value. Fox v. Mackreth, 2 Bro. C. C., 400, 420; Walters v. Morgan, 3 De G. F. & J., 923; Wilde v. Gibson, 1 H. of Lds., 605; Laidlaw v. Organ, 2 Wheat., 178; Livingston v. Penn. Iron Co., 2 Paige's Ch., 390; Perkins v. McGanock, Cooke, 415; Smith v. Beaty, 2 Ired. Eq., 456; Harris v. Tyson, 24 Pa. St., 347; Butler's App., 26 Pa. St., 63. See *contra*, where fraudulent misrepresentations were used. Swimm v. Bush, 23 Mich., 99.

insisting upon the misrepresentation as a defense. This principle will, of course, only apply where the thing in respect of which the representation is made is one perfectly visible to everybody.(*g*)

§ **659**. This case was supported by Grant, M. R., by the analogy of warranties at common law, in which, however general, defects apparent at the time of the bargain are not included, because they can form no subject of deceit or fraud; so that, for example, a person who buys a horse knowing it to be blind in both eyes, cannot sue for this defect on a general warranty of soundness.(*h*)

§ **660**. But for the vendor thus to countervail the effects of his own misrepresentation, the evidence of knowledge in the other party must be conclusive; he "must show very clearly that the purchaser knew that to be untrue which was represented to him as true; for no man can be heard to say that he is to be assumed not to have spoken the truth."(*i*)[1]

§ **661**. Such being the proof required, it is very certain

(*g*) Grant v. Munt, Coop., 173; infra, § 849 et seq.
(*h*) Bayly v. Merrel, Cro. Jac., 386; Margetson v. Wright, 7 Bing., 603.
(*i*) Per Knight Bruce, L. J., in Price v. Macaulay, 2 De G. M. & G., 346; Wilson v. Short, 6 Ha., 366, 378; Dyer v. Hargrave, 10 Ves., 505; Leyland v. Illingworth, 2 De G. F. & J., 248; Colby v. Gadsden, 34 Beav., 416.

[1] Chitty's Contr. (6th Am. ed.), 445, 446; Story's Contr., §§ 530, 532. The rule, however, at law, is not every where uniform. "A general warranty," says Mr. Parsons (vol. 1, bk. 3, ch. 5, p. 400, n. [*i*]), "is said not to cover defects plain and obvious to the purchaser, or of which he had cognizance: thus, if a horse be warranted perfect, and want a tail or an ear. 13 H., 4, 1 b, pl., 4; 11 Edw., 4, 6 b, pl., 10; Southerne v. Howe, 2 Rol. Rep., 5; Long v. Hicks, 2 Hump., 305; Schuyler v. Russ, 2 Caines, 202; Margetson v. Wright, 5 M. & P., 606; Dillard v. Moore, 2 Eng. (Ark.), 166. The same rule applies whether the warranty is express or whether the warranty is implied by law, from a sound price, as is the case in some States. Richardson v. Johnson, 1 Louis. Ann. Rep., 389. But care should be taken not to misunderstand nor misapply this rule. A vendor *may* warrant against a defect which is patent and obvious, as well as against any other. And a general warranty that a horse was *sound*, for instance, would, perhaps, be broken, if one eye was so badly injured, or so malformed as to be entirely useless; and although this defect might have been noticed by the purchaser at the time of sale. He may choose to rely upon the warranty of the vendor, rather than upon his own judgment, and we see not why he should not be permitted to do so. A warranty that a horse is sound, is broken if he cannot see with one eye. House v. Fort, 4 Blackf. 293. Why may not the vendor be equally liable if one eye was entirely gone? In Margetson v. Wright, 8 Bing., 454, 7 id., 603, a horse warranted sound had a *splint* then; this was *visible* at the time of the sale; but the animal was not then lame from it. He afterwards became lame from the effects of it, and the warranty was held to be broken. In Liddard v. Kain, 2 Bing., 183, an action was brought to recover the value of horses sold and delivered. The defense was that, at the time of the purchase, the plaintiff agreed to deliver the horses at the end of a fortnight, sound and free from blemish, and that at the end of a fortnight one had a cough and the other a swelled leg; but it also appeared that the seller informed the buyer that one of the horses had a cold on him, and that this, as well as the swelled leg, was apparent to every observer. The jury having

that the mere circumstance of other means of knowledge being open to the purchaser will not have this effect, even though, independently of any statement, the party relying on the representation would in law have been taken to have had notice of the contrary. The doctrine of notice has no application where there has been a representation as to the fact of which notice would be implied :(*j*) the proof must go further, and clearly show the purchaser to have had communicated to his mind information of the real state of facts.(*k*)

§ **662**. Therefore, where a distinct representation has been made, it will not be countervailed by any general statement or any circumstances from which an inference inconsistent with the representation might be drawn, even though, in the absence of such representation, they might be sufficient to put the other party on inquiry.(*l*)

§ **663**. These principles are applicable not only where the deceived party resists specific performance, but where he assumes the position of plaintiff and seeks to set aside the contract on the ground of misrepresentation. In Rawlins v. Wickham,(*m*) the plaintiff successfully repudiated a contract of partnership after he had been a partner for four years with full power of access to the books, and these books would have shown the falsity of the representation made to him.

§ **664**. Nor will it prevent the effect of a misrepresentation that the party making it recommended the other to consult his friends and professional advisors, for "no man can complain that another has too implicitly relied on the truth of what he has himself stated."(*n*)

(*j*) Drysdale v. Mace, 2 Sm. & Gif., 225, 230; cf. per Jessel, M. R., in Jones v. Rimmer, 14 Ch. D., 590.
(*k*) Price v. Macaulay, 2 De G. M. & G., 339. See, also, Gibson v. D'Este, 2 Y. & C. C. C., 542, 572.
(*l*) Wilson v. Short, 6 Ha., 366, 377.
(*m*) 1 Giff., 355; 3 De G. & J., 304
(*n*) Reynell v. Sprye, 1 De G. M. & G., 660, 710; Dobell v. Stevens, 3 B. & C., 623.

found a verdict for the defendant, a rule for a new trial was moved on, on the ground that where defects are patent, a warranty against them is inoperative. The court refused the rule, on the ground that the warranty did not apply to the time of the sale, but to a subsequent period. In Stucky v. Clyburn, Cheves, 186, a slave sold had a *hernia;* this was known to the buyer. Yet it was held to be within an express warranty of soundness. So of a swelling in the abdomen, plainly visible and known to the purchaser. Wilson v. Ferguson, Cheves, 109. So where a slave had the scrofula at the time of sale. Thompson v. Botts, 8 Mis., 710. And where a defect is obvious, yet, if the purchaser be misled as to its character or extent, a warranty is implied. Wood v. Ashe, 3 Strobh's L., 64." Upon this view of the case, the analogy of Sir William Grant, in Bayly v. Merrel, referred to in the text, would be neither so cogent nor so apt in this country as in England.

§ **665**. Thus where a misrepresentation is made by a vendor in respect of a lease, of the covenants in which the purchaser would, by law, be implied to have notice, the vendor will be equally bound by his statement as if no such implication arose.(*o*)

On the same principle it was decided that where a vendor represented the house to be substantially and well built, and it proved to be the contrary, the vendor was not entitled to specific performance, though the defendant might, of course, have inquired into its actual state (*p*)

§ **666**. In Harris v. Kemble(*q*) there was a contract consequent upon certain misrepresentations as to the profits of a theatre. Leach, V. C., was of opinion that these representations, being manifestly founded on accounts which were equally open to both parties (they being joint owners of the theater), and being justified by the accounts, did not avoid the contract; but his decision was overruled by Lord Lyndhurst and afterwards by the House of Lords, on the ground that the representations were made with a view to the contract, and that the accounts were so kept as to render it difficult without employing an accountant to draw any certain conclusion from them.

§ **667**. The circumstance that the vendor sold "with all faults," though it may serve to put the purchaser on his guard, will not enable the vendor to say that the purchaser did not rely on any representation made, or prevent the purchaser from avoiding the sale, if that representation were false.(*r*)

§ **668**. The principle that, in order to render a misrepresentation operative, there must be reliance on it by the party who uses it as a defense, applies to the case of the assignment of a contract originally affected by such a circumstance: thus it seems that if A. contract with B., and in so doing there are misrepresentations on the part of A. which would prevent his enforcing the contract against B., and B. assign the contract to C., on whom no fraud is practised and who is not affected by the original misrepresentation, in such circumstances the contract might be

(*o*) Van v. Corpe, 3 My. & K., 269; Flight v. Barton, id., 282; Pope v. Garland, 4 Y. & C. Ex., 394, 401. Distinguish Paterson v. Long, 6 Beav., 590.

(*p*) Cox v. Middleton, 2 Drew, 209.

(*q*) 1 Sm., 111, particularly 120; S. C., 5 Bli. (N. S.), 730.

(*r*) Schneider v. Heath, 3 Cam., 506. See, also, infra, § 857.

enforced against C., for he placed no reliance on the misrepresentation made to B.(*s*)

§ **669**. From the same principle it follows that if A. make a misrepresentation to the agent of B., which is believed by the agent to be true but known by B. to be false, B. cannot avail himself of this as a defense to specific performance(*t*)[1]

§ **670**. (6) It is, for obvious reasons, necessary, to constitute a misrepresentation which will prevent a specific performance, that the statement in question shall be so material to the contract built on it that, if the statement be false, the contract becomes one which it would be unconscionable for the party having made the statement to enforce. In other words, the misrepresentation must be shown to have operated to the prejudice of the defendant.(*u*) Therefore, where A. induced a purchaser to think that he was contracting with B. through his (A.'s) agency, whereas he was, in fact, contracting with A. himself, but there was nothing to induce the belief that he would not have contracted on the same terms with A., or that he had sustained any loss or inconvenience from acting under the mistake, the court enforced performance of the contract.(*v*) But it is sufficient if the misrepresentation operate to the prejudice of the defendant to a very small extent.(*w*)

§ **671**. The effect of misrepresentation on the contract and the rights of the parties under it is considered in connection with cases of fraud in the next chapter.

(*s*) Smith v. Clarke, 12 Ves., 477, 484.
(*t*) Nelson v. Stocker, 4 De G. & J., 458.
(*u*) See Polhill v. Walter, 3 B. & Ad., 114.
(*v*) Fellowes v. Lord Gwydyr, 1 Sim., 63; S. C., 1 R. & My., 83; cf. Flint v. Woodin, 9 Ha., 618.
(*w*) Cadman v. Horner, 18 Ves., 10. The distinction of the casuists between *error antecedens* and *concomitans* was the same as that referred to in this section. Error "dividitur in *antecedentem* qui dat causam contractui, ita ut, eo absente, contractus non fieret, et in *concomitantem*, seu incidentem, quo etiam absente adhuc contractus iniretur. * * * Si error circa solam qualitatem accidentalem contigerit, quæ simul cum substantia rei non ingreditur objectum substantiale contractus, hic validus omnino persistet." Mariani Examen, § 279.

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[1] *Fraudulent representations by the agent of a corporation.*] The corporation is bound by the acts of its accredited agent, acting within the scope of his authority, and must be held for his fraudulent acts. Burnes v. Pennell, 2 H. of Lds., 499; National Exch. Co. v. Drew, 2 McII., 125; Ranger v. Gt. Western R. R. Co., 5 H. of Lds., 86; Custer v. Titusville Water and Gas Co., 63 Pa. St., 381; see, however, Brockwell's Case, 4 Drew, 205.

Where the agent has no authority.] Where an agent has no authority to do the act, yet where a principal suffers a party to expend his money, believing that the representations of such agent were authorized by the principal, equity will not suffer such principle to plead that his agent had no authority. Kerr on Fraud and Mis., 117; Ramsden v. Dyson, L. R. 1 Ch., 129.

CHAPTER XIV.

OF FRAUD.

§ **672**. Fraud is, of course, a larger word than misrepresentation, and includes not only misrepresentation when fraudulent, which has already been considered, but also all other unconscionable and deceptive dealing of either party to any contract.[1]

§ **673**. Fraud comes before the court in several relations; as a defense to an action on the contract; as the ground for an action for deceit; as a ground for setting aside an executory or even an executed contract; as a defense to an action for specific performance; or, lastly, as forming an exception to the Statute of Frauds, in which relation it has been considered in the chapter (*a*) on that statute.

§ **674**. Fraud may arise either in the obtaining of the contract, or in the course of its performance.

Fraud in the obtaining of the contract has long been held a ground for the cancellation of the contract; and *a fortiori* it presents a complete defense to an action for specific performance.

§ **675**. Whether fraud in the course of its performance is in all cases a ground for the rescission of a contract is a point which cannot be considered as finally settled: it certainly appears to be so in all cases in which rescission is the only adequate remedy.(*b*) It is conceived that in no case could a party guilty of fraud in the performance of a contract ask

(*a*) Part III, chap. xi, § 544 et seq.
(*b*) Panama and South Pacific Telegraph Co. v. India-rubber, Gutta-percha and Telegraph Works Co., L. R 10 Ch., 515.

[1] "*In order to constitute fraud at common law*, it is not enough to show that fraud, in the sense of misrepresentation and undue advantage of the position of the parties said to be imposed upon, has been committed; but the extent of the fraud must be brought home to the party to the action who is charged with it. In the case of frauds in the sense of a court of equity, a court of equity will take into account all the circumstances of the case—not only the act and intention of the party, but the circumstances under which the act was done the position of the party who is said to be imposed upon; his being *inops consilii*; his being in a sense of bodily, and therefore mental, weakness, and so on—*non constat*, these are sufficient to constitute legal fraud." Kindersley, V. C., in Stewart v. Greatwest. R. R. Co., 2 Dr. & Sm., 438; 11 Jur. (N. S.), 627. "Fraud

the court to interfere for the purpose of enforcing its further performance. Thus if A. were to contract with B. for the sale of an estate at such a price as C. should fix and then were to bribe C. to fix a very high price, A. could never, it is submitted, bring an action against B. for the performance of the contract either at a price to be fixed by C. or by any third person.

§ **676**. In the chapter on misrepresentation it has been seen, that the suggestion of what is false is a ground for refusing specific performance, and also in certain cases for rescinding contracts: the same results flow from the non-disclosure of a fact which is material, and which it is the duty of one party to the contract to disclose to the other,(*c*)

(*c*) The question as to what facts which might influence the mind of one party it is the duty of the other, if knowing of them, to communicate, is one of great difficulty. It is discussed by Cicero in a well-known passage (De Offic. lib. iii, c. 12 et seq.); culpable concealment being in his opinion "cum quod tu scias id ignorare emolumenti tui causa velis eos quorum intersit id scire." (C. 13.) The limitation put by Grotius on this principle would probably be adopted by our law, "non ergo generaliter sequendum illud ejusdem Ciceronis, celare esse, cum tu quod scias id ignorare emolumenti tui causa velis eos quorum intersit scire: sed tum demum id locum habet, cum de iis agitur quæ rem subjectam per se contingunt." De Jur. Belli ac Pacis, lib. ii, c. 12. s. 9. See, also, Pothier, Tr. du Contrat de Vente, Part II, chap. 2, and supra, § 684, note 1. Consider Blenkhorn v. Penrose, 29 W. R., 237.

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is infinite; and were a court of equity to lay down rules how far they would go, and no further, in extending their relief against it, or to define strictly the species, or evidence of it, the jurisdiction would be cramped, and perpetually eluded by the new schemes which the fertility of man's invention would contrive." Park's Hist. of Chanc., 508. Lord Hardwick says, in Lawley v. Hooper, 3 Atk., 278: "The court very wisely hath never laid down any general rule beyond which it will not go, lest other means for avoiding the equity of the court should be found out." See, also, Kennedy v. Kennedy, 3 Ala., 571; Belcher v. Belcher, 10 Yerg., 121; Gale v. Gale, 19 Barb., 249; Laidlaw v. Organ, 2 Wheat., 195; Smith v. Richards, 13 Pet., 36; Tyler v. Black, 13 How., 231.

How fraud is to be shown] "A deduction of fraud may be made not only from deceptive assertions and false representations, but from facts, incidents and circumstances which may be trivial in themselves, but may, in a given case, often be decisive of a fraudulent design." 2 Kent's Com., 484. Where a party seeks relief on the ground of fraud, he who alleges the fraud has the burden of proof; it must be proved as alleged. Blair v. Bromley, 5 Hare, 559; Lomax v. Ripley, 24 L. J. Ch., 254; Smith v. Kay, 7 H. of Lds., 750; Mowatt v. Blake, 31 L. T., 387; Jenning v. Broughton, 17 Beav., 234; Burton v. Blakemore, 2 Jur., 1062; Brock v. McNaughtney, 5 Mon., 216; Gibson v. Randolph, 2 Munf., 310; Gerde v. Hawkins, 2 Dev.'s Eq., 393; Eyre v. Potter, 15 How., 42; Blaisdell v. Cowell, 14 Me., 370.

Fraud in matters of contract.] Lord Hardwick has divided fraud in matters of contract into four heads. "1st. Actual fraud arising from facts and circumstances of imposition. 2d. Fraud arising from the intrinsic nature and subject of the bargain. 3d. Fraud presumed from the circumstances of the bargain. 4th. Fraud inferred from the circumstances, and affecting some third person not a party to the transaction." Chesterfield v. Jansen, 2 Ves. Sen., 125.

Fraud very different from mistake.] Where the cause of action is based on fraud, it is very different from one based on a mistake alone. One cannot be substituted for the other on the trial. Ross v. Mather, 51 N. Y., 108; Hadley v. Scranton, 57 N. Y., 424; Burnham v. Walkup, 54 id., 656.

or from the active suppression and concealment of a fact which is material, and which the other party would have come to know, but for such suppression and concealment.

But mere silence as regards a material fact which the one party is not under an obligation to disclose to the other cannot be a ground for rescission or a defense to specific performance.

It becomes then most material to consider what facts either party to a contract is bound to disclose to the other.

§ **677**. The obligation to disclose arises in various ways.(*d*)[1]

(*d*) See Davies v. London and Provincial Marine Insurance Co., 8 Ch. D., 469, 474.

[1] It was decided in White v. Flora, 2 Overton, 426, that the concealment of a truth which, if correctly known, would probably be a reason for making the terms of the contract different, is a good ground for rescinding the contract in equity. In Snelson v Franklin, 6 Mun., 210, the owner of a lease agreed for the sale of it, without showing the lease to the vendee, or informing him of a provision in it, to the effect that in the case of the destruction, by fire, of the house leased, the term should then cease and determine. In the agreement of sale, it was represented that the lease was to continue four years. The house being burned soon after the sale, it was held that equity would relieve the vendee by enjoining the vendor from collecting the purchase money, and directing his notes therefor to be given up and canceled. See, also, McNeil v. Baird, 6 Munf., 316; Pollard v. Rogers, 4 Call, 439. In Halls v. Thompson, 1 S & M., 443, the concealment by the vendor of material facts, calculated to influence the vendee, or operate to his prejudice, were held to be fraudulent. In White v. Cox, 3 Hayw., 79, it was again held that suppression of a truth is sufficient ground for setting aside a contract in equity. Rawdon v. Blatchford, 1 Sandf., 344, affords another illustration of the same rule. In that case, A. borrowed money of B., and secured it by the transfer of stocks. A. was then cashier of a bank, and so continued until its failure, when it appeared that he was a defaulter to the bank for a large sum, and was insolvent. While this was known to the bank commissioners only, he obtained the stock from B , without consideration, upon a representation that he wanted it for a particular purpose, and would substitute other security for it. His purpose, which was to transfer the stock to the bank, to prevent a public disclosure, he withheld from B. On obtaining the stock, he immediately transferred it to the bank. Held, that A.'s concealment of his situation and purpose was a fraud upon B., and that the bank could not retain the stock for its demand against A. But where a vendee, in conversation with a vendor, charged him with having concealed an incumbrance upon the land sold, and the vendor neither admitted nor denied it, it was held that this was not sufficient evidence of fraudulent concealment to justify a rescission of the contract. Halls v. Thompson, 1 S. & M., 443. At law it is well settled that a vendor may be silent, leaving the purchaser to require a warranty. He may be silent and be safe. To vitiate the sale there must be *active fraud;* that is, if by acts or words he leads the buyer astray, then he exposes himself to the consequences of an action at law. Pars. Contr., vol. 1, p. 461; but see the case of Hill v. Gray, 1 Stark., 434. There a picture was sold which the buyer *believed* had been the property of Sir Felix Agar, a circumstance which might have enhanced its value in his eyes. The seller knew that the purchaser was laboring under this delusion, and did not remove it; but it did not appear that he either induced or strengthened it. In an action for the price, Lord Ellenborough nonsuited the plaintiff, saying that the picture was sold under a deception. The seller ought not to have let in a suspicion on the part of the purchaser, which he knew enhanced its value. He saw that the purchaser had fallen into a delusion, but did not remove it. From the report

(1) Where the parties to a contract stand in some pre-existing relationship to one another of a fiduciary character (as, for example, the relation of agent and principal),(*e*) they can only deal after the most full disclosure. The relations of trustee and *cestui que trust*,(*f*) solicitor and client, partner and partner, are all well known to be of a fiduciary kind. The cases arising out of such relationships show that when there is a non-disclosure of that which it is the plaintiff's duty to disclose, no specific performance can be granted.

§ **678**. (2) Sometimes the obligation to disclose may even arise from an antecedent wrong done by the one party to the other. "If," said Lord Hatherley, "a man knows that he has committed a trespass of a very serious character upon his neighbor's property, and finding it convenient to screen himself from the consequences, makes a proposal for the purchase of that property, he certainly ought to communicate to the person with whom he is dealing the exact state of the circumstances of the case:"(*g*) and on that ground and under these circumstances specific performance was refused.

(*e*) See Imperial Mercantile Credit Association v. Coleman, L. R. 6 H. L., 189; Dunne v. English, L. R. 18 Eq., 524.

(*f*) Probably in the case of a tenant for life purchasing from his trustees there is a relationship imposing a similar obligation. See per James, L. J., in Dicconson v. Talbot, L. R. 6 Ch., 37.

(*g*) Phillips v. Homfray, L. R. 6 Ch., 770, 779.

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itself it might be seen that Lord Ellenborough here held that silence alone was a fraudulent concealment, sufficient to vitiate the sale. But this is explained in the late English case of Keates v. Cadogan, 2 Eng., 318, Jervis, C. J., saying that in Hill v. Gray there was "*positive aggressive*" deceit. "Not removing the delusion might be equivalent to an express misrepresentation." The case of Brown v. Montgomery, 20 N. Y. (6 Smith), 287, seems to be in point. The Court of Appeals there decided that it is a fraudulent suppression avoiding the sale of commercial paper, for the vendor to withhold information that the makers' check upon the bank in which they kept their account, had been protested, though the vendor's informant accompanied his statement with the expression of his opinion that the makers were perfectly solvent. A distinction is taken between the case under consideration and that of Nichols v. Pinner (18 N. Y., 295). "The cases are essentially different. There we decided that where a merchant, knowing himself to be insolvent, purchases goods without disclosing the fact, there being no inquiry made, he is not necessarily guilty of fraud, as he may honestly believe that he may go on and retrieve his affairs. Where so much of the trade of the country is conducted without invested capital, or on borrowed capital, it must often happen that a merchant who is ultimately successful, has known periods of commercial disaster when his property would not pay his debts. It would be too strict to hold, that, under such circumstances, he must, in all cases, go into liquidation, or expose himself to probable bankruptcy by disclosing his condition. But the case does not countenance the position, that a dealer who has been of known standing, but who has suddenly failed in business, can go to those who are acquainted with his former character, but who have not heard of his failure, and innocently purchase their property on credit."

§ **679**. (3) Sometimes the obligation to disclose arises from the character of the contract itself. For there are certain contracts which are said to be *uberrimæ fidei*:" *i. e.*, they are contracts which, from their nature, demand a full disclosure of all material facts by the one contracting party to the other: such are contracts for marine insurance, and contracts for the formation of a partnership. In these cases silence may be fraud.(*h*) So again, in the case of the contract between a company and a person taking shares, the courts have held that there is an obligation to disclose material circumstances.(*i*)

In the case of a contract for the sale of a chattel having a latent defect, there exists an obligation to disclose that defect.(*j*)

§ **680**. (4) Sometimes the obligation to disclose arises from the course of the negotiation itself.

It is evident that the making of one statement during a negotiation may create an obligation to make another: so, if in the course of a negotiation A. make a statement to B. which is false in fact and which A. subsequently discovers to be false, he is under an obligation to state that discovery; or if A. make a statement to B. which at the time is true but in the course of the negotiations becomes false, A. becomes under an obligation to state that change of fact to B.(*k*)

"When," said Lord Blackburn, addressing the House of Lords, "a statement or representation has been made in the *bona fide* belief that it is true, and the party who has made it afterwards comes to find out that it is untrue, and discovers what he should have said, he can no longer honestly keep up that silence on the subject after that has come to his knowledge, thereby allowing the other party to go on, and still worse inducing him to go on, upon a statement which was honestly made at the time when it was made, but which he has not now retracted when he has become aware that it can be no longer honestly persevered in. That would be fraud too, I should say, as at present advised. And I go

(*h*) See per Lord Blackburn in Brownlie v. Campbell, 5 App. C., 954.

(*i*) New Brunswick, etc., Co. v. Muggeridge, 1 Dr. & Sm., 363; Central Railway Co. of Venezuela v. Kisch, L. R. 2 H. L., 99; Henderson v. Lacon, L. R. 5 Eq, 249. Consider Arkwright v. Newbold, 29 W. R., 455, reversing S. C., 28 W. R., 828; 49 L. J. Ch., 684.

(*j*) Horsfall v. Thomas, 1 Hurl. & Colt., 90.

(*k*) Reynell v. Sprye, 1 De G. M & G., 660, 703; Traill v. Baring, 4 De G. J. & S., 318, 329.

on further still to say, what is, perhaps, not quite so clear, but certainly it is my opinion, where there is a duty or obligation to speak, and a man in breach of that duty or obligation holds his tongue and does not speak, and does not say the thing he was bound to say, if that was done with the intention of inducing the other party to act upon the belief that the reason why he did not speak was because he had nothing to say, I should be inclined myself to hold that that was fraud also."(*l*)

§ **681**. Again, entire silence can hardly deceive: but an imperfect statement may be a perfect untruth. For instance, if the owners of a business, desiring to sell it to a company, put out a prospectus containing various statements, each in itself correct, but keep silence on a material fact, it would seem well worthy of consideration whether these persons who were under no antecedent obligation to make any statement have not, by saying something, assumed an obligation to tell not only the truth but the whole truth.(*m*) So where a proposed creditor describes a transaction to the proposed sureties, the description may be evidenced of a representation that there is nothing in the transaction that might not naturally be expected to take place between the parties to the transaction described.(*n*)

§ **682**. (5) Further, it must, to prevent confusion, be observed that there are obligations to disclosure which arise from the contract itself: as, for example, the obligation on a vender of real estate honestly to disclose his title. This is a duty arising out of, and subsequent to the contract, and the non-performance of this duty cannot constitute fraud *dans locum contractui*. With these we are not at present concerned.

§ **683**. (6) Lastly, an obligation to disclosure may arise from statute. The 38th section of the companies act, 1867 (30 and 31 Vict., c. 131),(*o*) provides that "Every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint-stock company, shall specify the dates and the names of the parties to any contract entered into by the company or the promoters, directors, or trus-

(*l*) In Brownlie v. Campbell, 5 App C., 950.
(*m*) Consider Peek v. Gurney, L. R. 6 H. L., 377.
(*n*) Lee v. Jones, 17 C. B. (N. S.), 482, 503.
(*o*) This section, and the cases under it, are discussed in Buckley on the Companies' Acts (3 1 ed), 455 et seq.

tees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors or the company, or otherwise; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract."

§ **684**. But it has never (it is believed) been held by our courts that there is any general obligation to disclosure on the part of a vendor or purchaser of chattels or realty, though the person maintaining silence may know that the other party is acting under an erroneous impression. "*Aliud est celare, aliud tacere: neque enim id est celare quicquid reticeas.*"(*p*)

It has been justly observed, by Mr. W. W. Story,(*q*) that "it is the general policy of the law, in order to induce vigilance and caution and thereby to prevent those opportunities of deceit which lead to litigation, to throw upon every man the responsibilities of his own contracts, and to burden him with the consequences of his careless mistakes." "I am not aware," said Lord Chelmsford, addressing the House of Lords in the case of Peek v. Gurney,(*r*) "of any case in which an action at law has been maintained against a person for an alleged deceit, charging merely his concealment of a material fact which he was morally but not legally bound to disclose." The case of Keates v. The Earl of Cadogan,(*s*) is an authority for the proposition that there is no obligation on a proposed lessor of a house in a ruinous and unsafe condition to inform the proposed lessee of its state. In Horsfall v. Thomas,(*t*) it was decided that the vendor of a chattel is under no obligation to disclose a patent defect. In Smith v. Hughes,(*u*) the court of Queen's Bench determined that the passive acquiescence of the seller of chattels in the self deception of the buyer does not entitle the latter to avoid the contract. Lastly, in Edwards-Wood v. Mar-

(*p*) Cicero De Off. Lib. iii, c. 13. Cicero continues: "Sed eum, quod tu scias, id ignorare emolumenti tui causa velis eos, quorum intersit id scire." The passage has been cited by Lord Mansfield in Carter v. Boehm (3 Bur., 1910), and by Knight Bruce, L. J., in Nelthorpe v. Holgate (1 Coll., 221). If the whole is to express the principles of our law, *velis* must, it is conceived, import not only will but some act consequent thereupon. See supra, § 676, note 1.

(*q*) Law of Contracts (5th ed.), s 644.

(*r*) L. R. 6 H. L., 390; and see page 403.

(*s*) 10 C. B., 591.

(*t*) 1 H. & Colt, 90.

(*u*) L. R. 6 Q. B., 597.

joribanks,(*v*) a contract was made for the sale of an advowson, nothing being said or asked as to the income of the living, which was in fact subject to a charge in favor of the Governors of Queen Anne's bounty, for repayment of a sum borrowed from them to rebuild the parsonage; the purchaser filed his bill for specific performance with compensation, but got a decree only for specific performance without compensation; and from this he ineffectually appealed, first to the Lords Justices, and lastly to the House of Lords.

§ **685**. Again, as regards the purchaser, he is not under an obligation to communicate any circumstance which may enhance the value of the thing bought by him. So that, for instance, a man knowing of the existence of a mine under an estate may validly deal with the owner who is ignorant of this fact, without any communication of it.(*w*) And so where a first mortgagee, with power of sale, having entered into an arrangement not amounting to a binding contract for the advantageous sale of part of the mortgaged property, afterwards bought up at a reduced price the interest of the second mortgagee without informing him of the arrangements for sale, a bill to set aside the sale by the second mortgagee, on the ground of the suppression of information by the purchaser, was dismissed by Lord Romilly, M. R., and subsequently by Lord Cranworth.(*x*) Nor is the purchaser liable to an action for deceit for misrepresenting the seller's chance of sale, or the probability of his getting a better price than that offered.(*y*)

§ **686**. The case is, however, quite different when, in addition to silence, something is done by the one party to conceal from the other some fact material to that other party. Thus, where a wall which required to be maintained against the Thames was industriously concealed, a bill for specific performance was dismissed, though without costs.(*z*)[1]

So, again, where colliery owners entered into a contract

(*v*) 1 Giff., 384; 3 De G. & J., 329; 7 H. L. C., 806. See, also, Haywood v. Cope, 25 Beav., 140.
(*w*) Fox v. Mackreth, 2 Bro. C. C., 400, 420; cf. Walters v. Morgan, 3 De G. F. & J., 723.
(*x*) Dolman v. Nokes, 22 Beav., 402.
(*y*) Vernon v. Keys, 12 East, 632.
(*z*) Shirley v. Stratton, 1 Bro. C. C., 440. Distinguish Cook v. Waugh, 2 Giff., 201.

[1] Margraft v. Muir, 57 N. Y., 155; Mank v. Patchin, 42 id., 167; Pumpelly v. Phelps, 40 id., 60; Bush v. Cole, 28 id., 261; Taylor v. Merrill, 55 Ill., 52; Fish v. Leser, 69 id., 394.

for the purchase of a farm adjoining their colliery not only without disclosing, but (it would seem) studiously concealing the fact, of which the vendors were at the time wholly ignorant, that they (the purchasers) had wrongfully taken 2,000 tons of coal from under the farm, the court dismissed with costs the purchasers' bill for specific performance of the contract, and ordered it to be delivered up to the vendors for cancellation.(*a*) And where A. agreed to sell his land to B. at a half-penny per square yard, which amounted to about £500, when the real value was £2,000, and the defendant asked the attorney whom he employed to calculate the amount before the contract was signed, not to tell the plaintiff how small it was, the court granted an interlocutory injunction against the deceiver to stay proceedings at law.(*b*) In Hill v. Gray,(*c*) the plaintiff had employed an agent to sell a picture, and the defendant bought it under the belief that it had belonged to a third person. The case has sometimes been thought to support the proposition that mere silence may be fraudulent. But in Keates v. Earl of Cadogan,(*d*) Jervis, C. J., pointed out that the case really turned on the "aggressive deceit" on the part of the agent of the seller; and if the case cannot be supported on this ground it seems not to be law.(*e*)

Even as regards a sale with all faults, the industrious and active concealment of faults would be fraudulent.(*f*)

§ **687**. So, though the purchaser may keep silence as to the advantages of the estate, he must not make any false representation as to it, or go any further than silence. "A very little," said Lord Eldon, "is sufficient to affect the application of that principle. If a word, if a single word, be dropped which tends to mislead the vendor, that principle will not be allowed to operate." Accordingly, in the case before his Lordship, the purchaser having made such suggestions of what was not true, the contract was set aside:(*g*) and in a case where a solicitor bought of a person in difficulties who was selling without professional advice, and untruly represented the nature and title of the prop-

(*a*) Fothergill v. Phillips, L. R. 6 Ch., 770.
(*b*) Deane v. Rastron, Anstr., 64.
(*c*) 1 Stark., 434.
(*d*) 10 C. B., 591.
(*e*) See per Lord Chelmsford in Peek v. Gurney, L. R. 6 H., 391.
(*f*) Baglehole v. Walters, 3 Camp., 154; Schneider v. Heath, Id., 506.
(*g*) Turner v. Harvey, Jac., 169, 178; and see Walters v. Morgan, 3 De G. F. & J., 723, 724; Davis v. Cooper, 5 My. & Cr., 270.

erty as such that no one but a professional man would purchase it, specific performance was refused.(*h*)[1]

§ **688**. It must be observed that it is possible that silence which would not constitute fraud may yet constitute such unfairness in a contract as to stay the hand of the court. The case of Ellard v. Lord Llandaff,(*i*) if it is to be supported on the ground of the silence of the lessee as to the fact that one of the lives in the surrendered lease was, at the time of signing the contract, *in extremis*, rests upon this principle; and was so put by Lord Manners in deciding it.(*j*)

§ **689**. The employment of a puffer at auctions is in some circumstances regarded as fraud, which will prevent the en-

(*h*) Davis v. Abraham, 5 W. R., 465. Cf. Summers v. Griffith, 35 Beav., 27.
(*i*) 1 Ball & B., 241.
(*j*) See, also, supra, § 383.

[1] But in Bowman v. Bates, 2 Bibb., 47, A. discovered a salt spring on B.'s land, and purchased the land at the ordinary price, concealing the fact of the discovery. Held, that the contract should be rescinded. In Drake v Collins, 5 How. (Miss.), 253, however, where property sold low, on execution, it being supposed to be the subject of a prior mortgage, when the fact that it was not might have been easily ascertained, it was held that the mere fact that the purchaser knew to the contrary was not ground to set aside the sale. Livingston v. Peru Iron Co , 2 Paige, 390, is an authority in accordance with the English decisions, as given in the text. In this case, Walworth, Ch , in delivering the opinion of the court, said, that although it had been held that the suppression of a material fact, by either party to the contract, was sufficient for an avoidance of the contract (Perkins v. M'Gavock, Cook's Rep., 417), that the courts of New York had never gone that length; although "very slight circumstances in addition to the intentional concealment of a fact, have been considered sufficient to constitute a fraud upon the other party." In the case before him—which was this—the vendee applied to the vendor, to purchase a lot of wild land, and represented to him that it was worth nothing, except for the purpose of sheep pasture, when he knew that there was a valuable mine on the lot, of the existence of which the vendor was ignorant—he decided that there was such fraud as would avoid the purchase. See the cases of Wendell v. Fosdick, 13 Johns.'s Rep., 325; Weller v. Colden, id., 395, and Turner v. Harvey, Jacob's Rep., 178, cited in the course of the chancellor's opinion. At law, although the principles which must govern the conduct of the *vendor*, are at exact variance with those of equity (Pars. Contr., vol. 1, p. 461), those which relate to the acts of the *vendee*, or purchaser, seem to be in perfect unison with them. The leading case on the subject is said to be Laidlow v. Organ, 2 Wheat., 178 (Pars. Contr., vol. 1, p. 461). The facts were these: One Shepherd, interested with Organ, and in treaty with Girault, a member of the firm of Laidlow & Co., at New Orleans, for a quantity of tobacco, had secretly received intelligence over night of the peace of 1815, between England and the United States, which raised the value from thirty to fifty per cent. Organ called on Girault on Sunday morning, a little after sunrise, and was asked if there was any news by which the price of tobacco might be enhanced; but there was no evidence that Organ had asserted, or suggested, anything to induce a belief that such news did not exist; and under the circumstances the bargain was struck. Marshall, C. J., delivered the opinion of the court, to the effect that the buyer was not bound to communicate intelligence of extrinsic circumstances, which might influence the price, though it were exclusively in his possession; and that it would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties.

forcement of the contract made at the auction. The cases prior to the recent legislation seem to fall under three heads, which it will be desirable to discriminate.

§ **690**. (1) Where the sale is announced to be without reserve, this excludes any interference on the part of the vendor which can, under any possible circumstances, affect the right of the highest bidder to have the property knocked down to him, and that without reference to the amount to which the highest bidding shall go.(*k*) Therefore the employment by the vender in such a sale of one or more persons to keep up the price on his behalf amounts to fraud in the contemplation of the court,(*l*) and is a bar to specific performance.(*m*) Where the vendors, assignees of an insolvent, put up his life-interest in certain property for sale by auction without reserve, having previously entered into an arrangement with a person whose wife was interested in remainder, that he should bid £35,000 and be the purchaser, unless a higher sum should be bid, and this fact was concealed, it was held to taint the sale to the defendant at the auction, though he purchased for £49,800.(*n*)[1]

§ **691**. The statement that a sale is without reserve may, of course, be modified by other statements, as in one case of a sale under the court, where it was stated that the sale was without reserve, but that all parties to the suit had liberty to bid: and the court of appeal in chancery held that the result of the two statements, though not very consistent, was such that the purchaser could not complain.(*o*)

§ **692**. (2) Where there is no declaration that the sale is without reserve, and no right of bidding is expressly reserved to the vendor, and he employs one person to prevent the property going at an undervalue; this has been thought not to be fraud in the contemplation of a court of equity,(*p*) though it clearly was in that of the courts of common law.(*q*)

(*k*) Per Lord Cottenham in Robinson v. Wall, 2 Ph., 375.

(*l*) Thornett v. Haines, 15 M. & W., 367, where the earlier cases are cited.

(*m*) Meadows v. Tanner, 5 Mad., 34. As to an intending purchaser buying off bidders, see Heffer v. Martyn, 15 W. R., 390; 36 L. J. Ch., 372, and cf. Re Carew's Estate, 26 Beav., 187.

(*n*) Robinson v. Wall, 10 Beav., 61; S. C., 2 Ph., 372.

(*o*) Dimmock v. Hallett, L. R. 2 Ch., 21.

(*p*) Smith v. Clarke, 12 Ves., 477; Woodward v. Miller, 2 Coll., 279; Flint v. Woodin, 9 Ha., 618; Bramley v. Alt, 3 Ves., 620.

(*q*) Per Lord Wensleydale in Thornett v. Haines, 15 M. & W., 372; Crowder v. Austin, 3 Bing., 368.

[1] See Morehead v. Hunt, 1 Dev. Ch., 65; Hinde v. Pendleton, Wythe, 144.

The distinction, however, was disapproved of, if not doubted, by Lord Cranworth in the case of Mortimer v. Bell.(*r*)[1]

§ **693**. Inasmuch as a contract, if originally void by the common law, ought not to be enforced by equity, the defendant in a suit in the court of chancery for specific performance might avail himself of the defense furnished by this fraud at law, and that formerly by means of a trial of the question at law.(*s*)

§ **694**. (3) Even in the absence of any declaration that the sale is without reserve, the employment of two or more persons as puffers has in all courts been considered fraudulent, inasmuch as only one person can be necessary to protect the property, and the employment of more can only be to enhance the price.(*t*)

§ **695**. The decision in the case of Mortimer v. Bell above mentioned led to the passing of an act of Parliament (the

(*r*) L. R. 1 Ch., 10. See infra, §§ 695, 696.
(*s*) Woodward v. Miller, 2 Coll., 279
(*t*) Per Lord Wensleydale in Thornett v. Haines, 15 M. & W., 372. See, also, Rex v. Marsh, 3 Y. & J., 331; Bramley v. Alt, 3 Ves., 620.

[1] But in Woods v. Hall, 1 Dev. Ch., 411, where a person interested in land sold at auction, employed another to bid for him, and represented the bid made, by such person as made on his own account, the sale was held to be fraudulent and was set aside. According to the early English decisions, the employment of puffers, by an owner, to bid for him at auction, was a fraud upon the real bidders. He could not enhance the price by a person privately employed by him for that purpose; but if he were unwilling that his goods should be sold at an under price, he might order them to be set up at his own price, and not lower, or he might previously declare, as a condition of the sale, that he reserved a bid for himself. Bexwell v. Christie, Cowp., 395; Howard v. Castle, 6 T. R., 642. And this doctrine seems to be approved in 2 Kent, 538, 539 (5th ed.), and 1 Story's Eq. Jur., § 293. It has been adopted, also, in later English cases. Crowder v. Austin, 2 Car. & P., 208; Wheeler v. Collier, 1 Mood. & Walk., 123; Fuller v. Abraham, 3 Brod. & B., 116; S. C., 6 Moore, 316 There are other cases, however, which have admitted a qualification of this doctrine. Among these is that of the text and Steele v. Ellmaker, 11 S. & R., 86. It has been decided in several American cases, that contract by which one party stipulated not to bid against another at an auction sale, or an agreement by one to bid for the benefit of himself and the other party were contrary to public policy, and a fraud on the vendor. James v. Caswell, 3 John.'s Cas., 29; Doolin v. Ward, 6 John., 194; Wilbur v. Howe, 8 id, 444; Thompson v. Davies, 13 id., 112; Dudley v. Little, 2 Ham., 505; Picatt v. Oliver, 1 McLean, 295; Gulick v. Ward, 5 Halst., 87. According to other decisions, the validity of such agreement is made to turn on the *quo animo*, and they will be valid if made *bona fide* for the sole purpose of preventing a sacrifice of the property Wolfe v. Luyster, 1 Hall, 146; Jenkins v. Hogg, 2 Const. (S. C.), 821; Smith v. Greenlee, 2 Dev., 126; Small v. Jones, 1 Watts & Serg., 128; Phippes v. Stickney, 3 Metc., 384, where the subject is discussed with clearness and the authorities are carefully examined. But an association of bidders with a design to stifle competition, is a fraud upon the vendor. Smith v. Greenlee, 2 Dev., 126; See, also, Morehead v. Hunt, 1 Badg. & Dev. Eq., 35; Moncrief v. Goldsborough, 4 Harr. & M'Hen., 281; Troughton v. Johnstone, 2 Hayw., 328; note in Bramley v. Alt (Sumn. ed.), 3 Ves., 620.

30 and 31 Vict., c. 48), which was introduced by Lord St. Leonards.

The 4th section of this act enacts that, after the passing of the act, whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law.

Land is defined to include hereditaments of whatever tenure: but the difference of the view of the courts of common law and equity as to fraud in auctions of chattels (if such difference exist) is left in its pristine vigor.

§ **696**. The 5th section of the act enacts that the particulars or conditions of sale by auction of any land shall state, (a) whether such land will be sold without reserve, or (b) subject to a reserved price, or (c) whether a right to bid is reserved: and

(a) If the land be sold without reserve, it is not lawful for the seller to employ any person to bid at such sale, or for the auctioneer to take knowingly any bidding from any such person.

(b) In the event of the land being sold subject to a reserved price the act is silent, but it has been held that in the absence of express stipulation, it is not lawful to employ any person to bid up to the reserved price.(*u*)

But (c) in the event of a reservation of a right to the seller to bid, it is lawful for him or for any one person on his behalf to bid at such auction in such manner as he may think proper (§ 6).(*v*)

§ **697**. As with regard to misrepresentation, so with regard to fraud in general, delicate questions arise where the fraud alleged is that of the agent practiced on third persons, and the principal is sued on the ground of deceit or for rescission by reason of such fraud.(*w*) But in actions for specific performance these questions cannot arise. If the principal of the fraudulent agent were the plaintiff, he would not be at liberty to avail himself of that agency in part and repudiate it in the rest of the transaction: to such a case the well-established principle of equity that innocent parties cannot derive benefits from the fraud of others(*x*) would apply. If, on the other hand, the fraud were that of

(*u*) Gilliat v. Gilliat, L. R. 9 Eq., 60.
(*v*) See Parfitt v. Jepson, 46 L. J. C. P., 529.
(*w*) See supra, § 636.
(*x*) Bridgman v. Green, Wilm. Not., 58; Huguenin v. Baseley, 14 Ves., 289: Nicol's Case, 3 De G. & J., 387, 438.

the defendant's agent, the plaintiff by suing on the contract would have waived the fraud and ratified the contract.

§ **698**. A particular class of cases arising from the agency of directors, and the fact that corporations are incapable of personal fraud, has occupied much attention in the courts of late years, and has evoked a considerable variation of opinion amongst the learned judges.(*y*) But the question can hardly arise in cases of specific performance for the reason indicated in the last preceding section.

§ **699**. Will the fraudulent act of a mere stranger, to which the plaintiff was neither party nor privy, deprive him of his right to enforce the performance of a contract? The question has never, it is believed, been judicially answered. But upon the general equitable principle that no person, though innocent, can derive a benefit from the fraud of another, the contract if resting absolutely *in fieri* could not be enforced. If the plaintiff were an assign for value of the contract, or if the contract were partly performed, the conclusion might probably be different.(*z*)

§ **700**. The effect of fraud on the contract tainted by it extends to the entirety of the contract, though the fraud may only have arisen or been practiced as regards one term or one part of that contract. Hence the party guilty of the fraud cannot enforce the contract to any extent even though he may waive the part affected by the fraud.

§ **701**. The same results follow from misrepresentation, even though innocent.

In a case where there was a misrepresentation which the judge considered not to have been willful, but to have arisen from misunderstanding as to the surrender of a lease on part of the property which was to be exchanged, and the plaintiff offered to take the land subject to the lease, and thus, as he contended, to abide by the contract, exonerated from what was affected by the misrepresentation; so that the question distinctly arose whether the misrepresentation avoided the contract *in toto* or only *quoad hoc;* Plumer, M. R., said, "there is no authority anywhere, no case where

(*y*) Ranger v Great Western Railway Co., 5 H. L C., 72; Burnes v. Pennell, 2 Id., 497; New Brunswick and Canada Railway, etc., Co. v. Conybeare, 7 Id, 711 (S. C., 4 Giff, 339; 1 De G F. & J., 578); National Exchange Co. of Glasgow v. Drew, 2 Macq, 103; Nicol's Case, 3 De G. & J., 387; Western Bank of Scotland v. Addie, L. R. 1 H. L. Sc., 145; Mackay v. Commercial Bank of New Brunswick, L. R 5 P. C., 394; Swire v. Francis, 3 App. C., 106.

(*z*) Consider Cobbett v. Brock, 20 Beav., 524.

the court has, when misrepresentation was the ground of a contract, decreed the specific performance of it; and nothing would be more dangerous than to entertain such a jurisdiction. The principle on which performance of an agreement is compelled, requires that it must be clear of the imputation of any deception. The conduct of the person seeking it must be free from all blame: misrepresentation, even as to a small part only, prevents him from applying here for relief. The reason of this is obvious: if it be so obtained, the contract is void both at law and in equity. When an agreement has been obtained by fraud, is the effect to alter it partially, to cut it down or modify it only? No; it vitiates it *in toto;* and the party who has been drawn in is totally absolved from obligation. If so, what equity has the other party who, by his misconduct, has lost one contract, to call on the court, for his benefit to make a new one? If the defendant were willing to consent to it, and to enter into a new agreement, it would be a different case; but if he refuses, if he insists that he is absolved from it, what equity can there be in favor of the other?"(*a*)

§ **702**. The view that fraud operates on the entire contract was adopted and approved by the court of appeal in chancery in Rawlins v. Wickham,(*b*) which was a suit for rescission, where the defendant urged that justice would be done not by rescinding the contract but by directing the representation to be made good; but the contention was rejected by Knight Bruce and Turner, L. JJ., on the ground that the misrepresentation gave a right to avoid the entire contract.

§ **703**. The effect of fraud on the contract is two fold. First, it renders the contract voidable at the election of the defrauded party; secondly, it operates as a personal bar to specific performance. These two effects are for many purposes distinguishable; for example, the right to rescind may be lost, and the right to object to specific performance may remain. These two effects will therefore be considered separately.

§ **704**. The first effect of fraud is to render the whole contract voidable, but viodable only. The contract is not void;

(*a*) Viscount Clermont v. Tasburgh, 1 J. & W., 119, 120.

(*b*) 3 De G. & J., 304. See, also, Kennedy v. Panama, etc., Mail Co, L. R. 2 Q. B., 580, 587; and cf. Hart v. Swaine, 7 Ch. D., 42, 47.

it is not a nullity. "It is now well settled," said Lord Campbell, C. J., in The Deposit and General Life Assurance Co. Registered v. Ayscough,(*c*) "that a contract tainted by fraud is not void but only voidable at the election of the party defrauded." It is valid till disaffirmed; not void till affirmed.(*d*)

§ **705**. From this distinction, many important consequences follow: it follows that the defrauding party is bound until the defrauded party elect to the contrary, and that he can never set up any invalidity in the contract: it follows that the defrauded party is equally bound, until he rescind;(*e*) it follows that the property the subject of the contract passes to the purchaser, whether defrauding or defrauded, until avoidance; it follows that all mesne dispositions by the defrauding party to third persons not parties or privies to the fraud are valid, so that third persons may acquire absolute interests and rights under the fraudulent contract;(*f*) and lastly it follows that the defrauded party may, by electing to be bound or by losing his right to repudiate, become absolutely bound by the contract.

§ **706**. The right of rescinding a contract may, however, be precluded or lost by any one of the following circumstances, viz., (1) impossibility; (2) the vesting of an interest under the contract in an innocent person which renders rescission inequitable; (3) the election of the defrauded party to abide by the contract; or (4), the inability of the defrauded party to perform the obligation which rests upon him to make restitution on his part.(*g*)

§ **707**. (1) The recission has become impossible when its object is to get back something which is actually destroyed, as, *e. g.*, if A. sought to rescind a contract for the sale of a sheep to B., which sheep B. had killed and eaten.(*h*)

The rescission would be equally impossible, but for a legal and not a physical reason, if B. instead of killing the sheep had sold it; for the contract between A. and B., not being void, vested the property in B., and consequently before rescission B. could make a good title to C., and C. could

(*c*) 6 El. & Bl., 671. See, also, Nicol's Case, 3 De G. & J., 387, 431; Clarke v. Dickson, El. B. & E., 118; Oakes v. Turquand, L. R. 2 H. L., 325, 346; Urquhart v. Macpherson, 3 App. C., 831.

(*d*) See per Lord Cairns in Reese River Silver Mining Co. v. Smith, L. R. 4 H. L., 69.

(*e*) Deposit and General Life Assurance Co. Registered v. Ayscough, 6 El. & Bl., 761.

(*f*) Stevenson v. Newnham, 13 C. B., 285, 302.

(*g*) See Clough v. London and North Western Railway Co, L. R. 7 Ex., 26.

(*h*) Pothier, du Contrat de Vente, s. 348.

hold free from any right of rescission in A.(*i*) It is too late for the defrauded vendor to declare his election to rescind when the property has passed from the fraudulent vendee to a third person.(*j*)

§ **708**. (2) The rescission is inequitable when third persons innocent of the fraud have acquired interests under the contract, and such innocent persons would consequently be injured by its rescission. So in the great case arising out of Overend Gurney & Co.'s failure, it was held by the House of Lords that the person who took shares by reason of a fraudulent misrepresentation could not, after a winding up order, rescind this contract and have his name removed from the list, because the creditors of the company had acquired an interest in the enforcement of the contract which, as they were innocent, the shareholder could not defeat by rescinding.(*k*)

§ **709**. (3) An election to abide by the contract will prevent its rescission. A person defrauded into making a contract has but an election, and an election once determined is determined for ever.(*l*) Whether this election must be made within a reasonable time, or whether the party entitled to elect may do so at any time, unless he has, in the meanwhile, lost that right on some other ground—as, *e. g.*, the acquisition of rights by third parties, is a question left open by the most recent case on this subject.(*m*) It is certain, however, that in the case of rescission for fraud, the election once determined in favor of the contract precludes any subsequent rescission.(*n*)

§ **710**. In the case of contracts to take shares induced by a misrepresentation of the objects of the company, it is now determined that the date of the allotment of the shares is the very latest date to which the reasonable time for election extends.(*o*)

§ **711**. The election to abide by a contract may be by express words, or may be inferred from acts done with a

(*i*) Kingsford v. Merry, 11 Ex , 577; Load v. Green, 15 M. & W., 216, 219.
(*j*) White v. Garden, 10 C. B., 919.
(*k*) Oakes v. Turquand, L. R. 2 H. L. 325; Mixer's Case, 4 De G. & J., 575.
(*l*) Comyn, Dig. Election, c. 2. Clough v. London and North-Western Railway Co., L. R. 7 Ex., 26, 34.
(*m*) Morrison v. Universal Marine Insurance Co., L. R. 8 Ex , 40, 197, particularly 205.
(*n*) Campbell v. Fleming, 1 A. & E., 40; Clough v. London and North-Western Railway Co., L. R. 7 Ex., 26. See, also, Gray v. Fowler, L. R. 8 Ex., 249.
(*o*) Oakes v. Turquand, L. R. 2 H. L., 325, and particularly 352, where the earlier cases are considered.

knowledge of the invalidity of the contract.(*p*) The election is not necessarily formal or express.

As soon as the fraud is discovered the right to elect arises; and if this has been exercised by affirming the contract, the subsequent discovery of fresh incidents of the same fraud will not give rise to a new right to rescind.(*q*)

§ **712**. (4) The person who seeks rescission and thereby restitution to his state before the contract, must do the like on his part and make restitution. "*Restitutio in integrum*," said Lord Cranworth,(*r*) "can only be had where the party seeking it is able to put those against whom it is asked in the same situation in which they stood when the contract was entered into."

If, by any act on his part, done even in ignorance of the fraud, the defrauded party has made this impossible, he cannot obtain recission;(*s*) as, *e. g.*, if A. has by fraud been induced to buy a sheep of B. and seeks the repayment of the money paid to B., he must offer to restore the sheep, and if he has himself killed the sheep, he cannot seek such rescission,(*t*) though he may still maintain his action against B. for the fraud practiced on him.

In the case of Clarke v. Dickson,(*u*) the plaintiff sought to rescind a contract for the sale of shares in a mine, and the following facts were held to be several grounds of objection all falling under this principle; (1) that he had held the shares for three years, and that they were not the same shares at the beginning of the time as at the end; (2) that he had received dividends: (3) that he had concurred in the conversion of the concern from a partnership on the cost-book principle, into a joint-stock corporation; and (4) that at the time of the offer to restore the company was being wound up and all chance of profit was gone.

§ **713**. In a more recent case in the House of Lords the plaintiff complained of fraud in inducing a contract on his part to take shares in an unincorporated banking company:

(*p*) Per Lord Lyndhurst in Attwood v. Small, 6 Cl. & Fin., 432; Macbryde v. Weekes, 22 Beav., 533. Comyn, Dig. Election, c. 1. Clough v. London and North-Western Railway Co., L. R. 7 Ex, 26; Morrison v. Universal Marine Ins. Co., L. R. 8 Ex., 197, 203

(*q*) Campbell v. Fleming, 1 A. & E., 40.

(*r*) In Western Bank of Scotland v. Addie, L. R. 1 H. L. Sc, 164.

(*s*) S. C., 166.

(*t*) See Clarke v. Dickson, El. B. & El., 148. Nicol's Case, 3 De G. & J., 387, 431; Great Luxembourg Railway Co. v. Magnay, 25 Beav, 586. This case, so far as it determined that the plaintiffs had lost their remedies besides rescission, seems bad law. See Kimber v. Barber, L. R. 8 Ch., 56

(*u*) El. B. & E, 148 See, too, Sheffield Nickel Co. v Unwin, 2 Q. B. D., 214, 223; Urquhart v. Macpherson, 3 App. C., 831; and consider Maturin v. Tredennick, 12 W. R., 740.

and the circumstances that the plaintiff had in ignorance of the fraud taken part in proceedings to convert this company into an incorporated company, and that the company was in course of winding up, were held to preclude the plaintiff from rescission. Lord Cranworth thought that the former circumstance would of itself have been sufficient.(*v*)

§ **714**. The receipt of dividends before discovery of the fraud was relied upon in the case of Clarke v. Dickson,(*w*) as precluding rescission; and there are other authorities to show that, at common law, the reception of any benefit under a contract will preclude its rescission for default of performance by the other party.(*x*) But it is submitted that no such rule prevails where the rescission is on the ground of fraud, and that where a benefit has been received and is capable of restoration either in kind or by way of compensation, and the defrauded party offers such restoration, he has not lost his right to rescind.

For to return to the illustration of the sheep:—if, before the discovery of the fraud, A. has sheared the sheep, it appears reasonable to hold that such change in the condition of the sheep will not deprive A. of his right to rescind, if he offer to restore the sheep and account for the wool.

So, in Earl Beauchamp v. Winn,(*y*) the House of Lords held that the construction of a warping-drain and the inclosure of a common would not have prevented the rescission of a contract for the sale of the land on the ground of mistake: and in The Lindsay Petroleum Co. v. Hurd (*z*) the privy council took the same view of the facts that possession had been taken under the contract and a trial well sunken. In that case the court below had offered an account of the profit of the well, if any, which was not accepted.

§ **715**. In the rule as above stated,(*a*) the act precluding restoration is referred to the party bound to restore. Is it essential that it should be by his act, or is it enough that even by another's act the restoration is impossible? To return once more to the sheep. Can the defrauded purchaser claim to rescind though the sheep have died by the act of

(*v*) Western Bank of Scotland v. Addie, L. R. 1 H. L. Sc., 145.
(*w*) El B & E, 148.
(*x*) Hunt v. Silk, 5 East, 449; Blackburn v. Smith, 2 Ex., 783.
(*y*) L. R. 6 H. L., 223, 232.
(*z*) L. R. 5 P. C., 221. See, also, per Crompton, J., in Deposit and General Life Assurance Co. Registered v. Ayscough, 6 El. & Bl. 761.
(*a*) Supra, § 706.

God? The point seems to have never been decided. On the one side there are cases in which are found general statements of the law which imply that the impossibility of restoration from whatever cause is a bar to rescission.(*b*) And it may be open to question whether any real distinction can be drawn between the innocent act of the defrauded party which precludes him from restoration, and the act of God, or of a third person, leading to a similar result. On the other side is the language of Crompton, J., in Clarke v. Dickson,(*c*) that "the true doctrine is that a party can never repudiate a contract after, by his own act, it has become out of his power to restore the parties to their original condition."

§ **716**. As our law is far from clear on this point it may be useful to refer to the principles of French law as expounded by Pothier.(*d*) According to him, an action for rescission was not precluded by the change or destruction of the thing sold If the destruction took place without the act of the plaintiff, he was not bound to do more than he could. If the horse had died, the plaintiff must give back his skin; if the cow sold had died of a contagious disease, and been buried, he need return nothing. If, on the other hand, the change or destruction was due to the act of the plaintiff, he was bound to account to the defendant for the value of the thing but did not lose his action.

§ **717**. The right to rescind does not arise from an innocent misrepresentation, unless it be such as to show there is a complete difference in substance between what was supposed to be and what was taken so as to constitute a failure of consideration.(*e*)

§ **718**. It must not be assumed that in every case in which the right of rescission is lost, every other remedy in respect of the transaction is lost also. This is not the case. Thus, a person induced to take shares by fraud may have lost the right of rescinding the contract, but may yet sue the deceiver for indemnity against the loss resulting from the contract.(*f*) A principal authorizes an agent to buy shares at

(*b*) Hunt v. Silk, 5 East, 449; Blackburn v. Smith, 2 Ex., 783.

(*c*) El. B. & E., 155, approved in P. C. Urquhart v. Macpherson, 3 App. C., 831. See, too, Sheffield Nickel Co. v. Unwin, 2 Q. B. D., 214, 223.

(*d*) Traite du Contrat de Vente, §§ 220-223.

(*e*) Kennedy v. Panama, etc., Mail Co., L. R. 2 Q. B., 580; Torrance v. Bolton, L. R. 8 Ch., 118. Cf. Brett v. Clowser, 5 C. P. D., 376.

(*f*) Peek v. Gurney, L. R. 6 H. L., 377.

£3 per share on the agent's representation that he can procure them for that price: the agent has, in fact, just bought them for £2 a share; the principal having sold the shares before the discovery of the fraud cannot rescind the contract, but may sue the agent for the difference between £3 and £2 per share.(*g*)

§ **719**. The second effect of fraud on the contract is this: it "operates," as expressed by Lord Lyndhurst, "as a personal bar to the relief.(*h*) This is an operation independent of the rescission of the contract; and though there can be no doubt that, where the defrauded party has elected to be bound by the contract, he has also waived the right to insist on the personal bar; it does not follow that he has also lost the right to set up that bar where rescission has become impossible from the interests of third persons, or from the impossibility of restitution arising either from the act of God or of third persons or from his own act before knowledge of the fraud. In all these cases, it is conceived that the defendant might still urge the fraud as a bar to specific performance—just as at common law he might, after having lost his right to rescind in any of the ways last indicated, maintain an action of deceit against the defrauding party.(*i*)

An innocent misrepresentation may, as well as a fraudulent one, constitute a personal bar to relief.(*j*)

§ **720**. Where it appears that the execution of a contract in the manner insisted on by the plaintiff will result in a fraud upon the public, the court will not enforce the performance of the defendant's part of the contract. Thus, in a case where the plaintiffs sought to compel the defendant to perform an alleged contract by him to edit a guide-book with a title-page, stating it to be the work of K. (a well-known editor of such books), who, in fact, had nothing to do with it; it was held, that the defendant was justified in staying his hand and breaking off the delivery of "copy" of his manuscript, on the ground that such a title-page was calculated to deceive the public.(*k*)[1]

(*g*) Kimber v. Barber, L. R. 8 Ch., 56
(*h*) In Harris v. Kemble, 5 Bli (N. S.), 75[1].
(*i*) Clarke v. Dickson, El. B. & E., 148.
(*j*) Clermont v. Tasburgh, 1 J. & W., 112.
(*k*) Post v. Marsh, 16 Ch. D., 395. Cf. Oldham v. James, 15 Ir Ch R., 81.

[1] *Parol proof to invalidate written contract in case of fraud.*] The operation of a deed or other written contract, complete and intelligible in itself, will be con-

trolled by parol evidence, where fraud is alleged and proved. Where a party applies to a court of equity for the enforcement of a written contract, the adverse party is entitled to show that the instrument never contained the true contract between the parties. Nelson v. Wood, 62 Ala., 175; Rearich v. Swineheart, 11 Pa St., 233; Atlantic Delaine Co. v. James, 4 Otto, 207.

Fraudulent use of a written instrument] "It is enough that, though the parties acted in mutual good faith at the inception of the transaction, an attempt is made to invest the instrument to a different purpose not contemplated, or to use it in violation of the accompanying agreement. It is as much a fraud to obtain a paper for one purpose, and to use it for a different and unfair purpose, as to practice falsehood or deceit in its procurement. The primary honesty of purpose but adds to the moral terpitude of the subsequent efforts to escape from it; or, when moral guilt cannot be imputed, a legal delinquency attaches upon an attempted abuse of the writing, sufficient to subject it to the influence of the oral evidence." Bell, J., in Rearich v. Swineheart, 11 Pa. St., 233; see, also, Parks v. Chadwick, 8 Watts & Serg., 96; Archer v. McCray, 59 Ga., 546. "All the cases show that, to pave the way for the reception of oral declarations, it is not necessary to prove that a party was actuated by a fraudulent intention at the time of the execution of the writing. His original object may have been perfectly honest and upright; but if, to procure an unfair advantage to himself, he subsequently deny a parol qualification of the written contract, it is such a fraud as will, under the rules, operate to let in evidence of the real intent and final conclusion of the contractors." *Per curiam*, in Rensham v. Gauz, 7 Pa. St., 117; Murry v. Duke, 46 Cal., 644; see, also, Neal v. Speigle, 33 Ark., 63; Young v. Peachey, 2 Atk., 256; Campbell v. McClanachan, 6 Serg. & Rawle, 172; Lyon v. Huntington Bank, 14 id., 283; Oliver v. Rowland, 4 Rawle, 141; Hultz v. Wright, 16 Serg. & Rawle, 345; Thompson v. White, 1 Dallas, 424; Archer v. McCray, 59 Ga., 546.

Fraud as to third person's rights] "Where once a fraud has been committed, not only is the person who has committed the fraud precluded from deriving any benefit from it, but every other person is so likewise, unless there has been some consideration moving from himself If there has been consideration moving from a third person, and he was ignorant of the fraud, such third person stands in the ordinary condition of a purchaser without notice. But where there has been no consideration moving from himself, a third person, however innocent, can derive no sort of benefit or advantage from the transaction." Wood (V. C.), in Scofield v. Templer, Johns., 156; Berry v. Whitney, 40 Mich., 65.

Gross inadequacy of consideration may be evidence of fraud.] Gwynne v. Heaton, 1 Bro. C. C., 8; Janes v. Morgan, 1 Lev., 111; Butter v. Haskell, 4 Dessau.'s Eq., 651; Haygarth, v. Wearing, L. R., 12 Eq., 320; Osgood v. Franklin, 2 John.'s Ch., 1; Gifford v. Thorn, 9 N. J. Eq., 702; Coffee v Ruffin, 4 Coldw., 507; Judge v Wilkins, 19 Ala., 765; Warner v. Daniels, 1 Woodb. & Minot, 90; Byers v. Surget, 19 How., 303; Wright v. Wilson, 2 Yerg., 294; Hardiman v. Burge, 10 id., 202; Morris v. Phillibar, 30 Mo., 145; Deaderich v. Watkins, 8 Humph., 520.

Fraud as against creditors.] "Distributees have no right whatever to intermeddle with the personal estate of the deceased, for any other purpose than to do such acts as may be necessary to preserve it until an administrator can be appointed Any other acts of control by any person, constitute him an executor *de son tort*, and subject him as a penalty to the payment of the debts of the deceased When, therefore, this bill shows that the children of William Simons, Sr., instead of subjecting this property to the payment of his just debts in a due course of administration, made an agreement that no administration should be taken; that they would wholly disregard the rights of creditors, and treat the property as their own, it shows an agreement which a court of equity cannot enforce. It is not based on any equitable rights of the parties. It is a violation of the common law. It tends to defraud creditors. It is plainly forbidden by public policy." Curtis, J., in Allen v. Simons, 1 Curtis, 122; McKewan v. Sanderson, L. R., 20 Eq., 65; Forsyth v. Clark, 3 Wend., 637; Bird v. Aiken, 1 Rice's Ch., 73; Clemens v. Davis, 7 Pa. St., 263; Thornton v. Davenport, 1 Scam., 296.

Fraud as evidenced by voluntary conveyance] "Upon a full examination of all the cases, the legal principal appears to be established, that when a voluntary conveyance is made and received with an actual intent to defraud the then existing creditors of the grantors, it is not a *bona fide* conveyance which can protect the grantee against the claims of subsequent creditors." This is the rule as laid down by Walworth, Ch., in Kings v. Wilcox, 11 Paige's Ch., 589. In Day v. Cooley, 118 Mass., 524, Morton, J., said: "It is well-settled that if a debtor makes a conveyance with the purpose of defrauding either existing or future creditors, it may be impeached by either class of creditors." Shand v. Hanley, 71 N. Y., 319; Case v. Phelps, 39 id., 164; Dewey v. Moyer, 72 id., 70; Cole v. Tyler, 65 id., 73; Curtis v. Fox, 47 id., 300.

Defense of bona fide purchaser without notice.] In order that the defense of a *bona fide* purchaser, without notice, may be perfect, such purchaser must have paid in full before notice of the vendor's fraud. Florence Sewing Machine Co. v. Ziegler, 58 Ala., 221. Stone, J., said in this case: "We do not sanction the extreme doctrine that a purchaser, no matter how innocent he may be, acquires no rights against a latent equity until he pays, in full, and receives a conveyance. We hold that he acquires an equity *pro tanto* to the extent he pays before notice."

Fraud may be waived, and how?] Where a party has been defrauded in a contract, he may waive the fraud and adopt the contract. He may do so by positive act, or his conduct may show that he acquiesces. Vernol v. Vernol, 63 N. Y., 45; Atwood v. Small, 6 Cl. & Fin., 432; MacBryde v. Weeks, 22 Beav., 533; Dougherty v Dougherty, 3 Halst.'s Ch., 627; Moffatt v. Winslow, 7 Paige's Ch., 124; Crawley v. Timberlake, 2 Ired.'s Eq., 460.

Voluntary conveyance in fraud of creditors.] Where a conveyance of property is made in trust for the use of the party making the transfer, it is void as against creditors. Where the transfer is of all the property belonging to the debtor, the grant is conclusive evidence of fraud as to indebtedness then existing. A grantee in a voluntary conveyance does not occupy the position of a *bona fide* purchaser for value, that he is innocent of fraudulent intent, will not protect his title. Young v. Hermans, 66 N. Y., 382; see cases cited.

Equity will relieve against a judgment on the ground of fraud.] A gross exaggeration of value, knowingly and willfully made in the absence of the adverse party, would be sufficient evidence of fraud to invalidate the assessment of damages. Jordan v. Volkening, 72 N. Y., 300; Hunt v. Hunt, 72 id., 217; State of Michigan v Phœnix Bank, 33 id., 9. Kent, Ch , said in Foster v. Wood, 6 John.'s Ch., 87, "that chancery would not relieve against a judgment at law on the ground of its being contrary to equity, unless the defendant in the judgment was ignorant of the fact in question pending the suit, or it would have been received as a defense, or unless he was prevented from availing himself of the defense by fraud or accident unmixed with negligence or fault on his part."

Fraud of a party who assumes to act for a third person.] Equity will deprive a party of the benefit he may have derived from his own fraud, imposition or undue influence, by preventing acts intended to be done for the benefit of a third person Story's Eq. Jur., § 256; Shadda v. Sawyer, 4 McLean, 181; Bellamy v Sabine, 2 Phil., 425; Hunter v. Griffin, 19 Ill., 251; Johnson v. Coun, 22 Wis., 329.

"*In cases of fraud, equity will sometimes imply a trust*, and treat the perpetrator of the fraud as a trustee *ex maleficio* for the purpose of administering a remedy against the fraud, and in such a case the fraud gives the jurisdiction " Earl, J., in Wheeler v. Reynolds, 66 N. Y., 227; see, also, Anthony v. Leftwick, 3 Rand., 238; Jackson v. Gray, 9 Geo., 77; Ambuchon v. Bender, 44 Mo., 560; Mendenhall v Treadway, 44 Ind., 131; Aldridge v. Dana, 7 Blackf , 249; Dugan v. Vattier, 3 id., 245.

CHAPTER XV.

OF MISTAKE.

§ **721**. There being two parties to every contract, it follows that mistake may be: 1st, the mistake of the defendant alone; or 2ndly, the common mistake of both plaintiff and defendant; or 3rdly, the mistake of the plaintiff alone. The first and second species will require discussion, as grounds of defense to an action for specific performance; the second and third will both raise the question how far the plaintiff may enforce performance with a correction of the error. It will be necessary to consider mistake not only as a defense to a specific performance, but, also, to some extent as giving a plaintiff a right to a rescission or rectification of the contract [1]

[1] *Mistake is thus defined by Mr. Kerr*] "Some unintentional act, omission, or error, arising from unconsciousness, ignorance, forgetfullness, imposition or misplaced confidence." Kerr on Fraud and Mis., 396. Equity relieves against a mistake, as well as against fraud, in a deed or contract in writing; and parol evidence is admissible to prove the mistake, though it is denied in the answer; and this, either where the plaintiffs seeks relief affirmatively, on the ground of the mistake, or where the defendant sets it up as a defense to rebut an equity. And, it seems, that a party may show a mistake in an agreement of which he seeks the specific performance. Gillispie v. Moon, 2 John.'s Ch., 585; see, also, Hutton v. Edgerton, 6 S. C., 485; Hayne's Outlines of Eq., 132; Mason v. Armitage, 13 Ves., 25; Jeremy's Eq. Jur., book 3, pt. 2, p. 358. "The English courts have repeatedly expressed a strong inclination not to decide in favor of plaintiff's seeking; not to set aside the agreement, but to enforce it, when it is reformed by parol evidence. They affirm that the difference of right and condition as to the plaintiff and defendant, relating to evidence offered for the purpose of obtaining a decree or resisting it, exists in the code of every civilized nation. The ground of the distinction is this: when a party has entered into a written agreement, and seeks, as plaintiff, a specific performance of it, he must rely on the agreement as it stands. He can neither add to, vary, or explain any of its terms by parol proof. If he cannot enforce the true contract, he still retains all he was ever in possession of. He may suffer disappointment, which, as the consequence of his want of caution and explicitness, he must bear. But not so with the defendant. He might encounter not disappointment only, but sustain ruinous loss, if compelled specifically to execute an agreement different from that which he contemplated." Lumpkin, J., in Rogers v. Atkinson, 1 Kelly, 12; see, also, Peterson v. Grover, 10 Me., 363; Bellows v. Stone, 14 N. H., 175. Lord Eldon said in Marquis of Townshend v. Stangroom, 6 Ves., 328: "It cannot be said that because the legal import of a written agreement cannot be varied by parol evidence intended to give it another sense, therefore, in equity, when once the court is in possession of the legal sense, there is nothing more for it to inquire into. All the doctrine of the

§ **722**. Mistake may be of such a character as, in the view of a purely common law court, to avoid the contract on the ground of want of consent or of total failure of consideration.(*a*) But equity does not confine the defense of mistake to these cases. The principle upon which it proceeds is this:—that there must be a contract legally binding, but that this is not enough—that to entitle the plaintiff to more than his common law remedy, the contract must be more than merely legal. It must not be hard or unconscionable: it must be free from fraud, from surprise, and from mistake: for where there is mistake, there is not that consent which is essential to a contract in equity: *non videntur qui errant consentire.*(*b*)[1]

§ **723**. In some cases, mistake furnishes an absolute bar to specific performance: in other cases it affords no such ground, if the plaintiff be willing to make a reasonable compensation to the defendant for the mistake made: whether a given case falls within one or other of these categories depends on all its circumstances.(*c*)

§ **724**. Again, the Statute of Frauds has not affected the situation of a defendant against whom specific performance is sought,(*d*) and it, therefore, leaves it open to him to produce any evidence for his purpose, which is not to establish a contract, but to rebut an equity which the plaintiff insists has arisen out of a contract.

(*a*) Raffles v. Wichelhaus, 2 H. & C., 906; Kennedy v. Panama, etc., Mail Co., L. R. 2 Q. B., 580.
(*b*) Dig. Lib. 50, tit. 17, t. 116.
(*c*) London and Birmingham Railway Co. v. Winter Cr. & Ph., 57, 62; McKenzie v. Hesketh, 7 Ch. D., 675.
(*d*) Per Grant, M. R., in Clarke v. Grant, 14 Ves., 519.

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courts as to cases of unconscionable agreements, hard agreements, agreements entered into by mistake or surprise, which the court will not execute, must be struck out, if it is true that because parol evidence should not be admitted at law, therefore it shall not be admitted in equity upon the question whether, admitting the agreement to be such as at law it is said to be, the party shall have a specific execution, or be left to that court in which it is admitted parol evidence cannot be introduced." Lord Redesdale in Clinan v. Cooke, 1 Sch. & Lef., 39, says: "No person shall be charged with the execution of an agreement who has not, either by himself or his agent, signed a written agreement; but the statute does not say that if a written agreement is signed, the same exception shall not hold to it that did before the statute."

[1] It is a matter, of course, for courts of equity to grant relief on the ground of mistake. Chamberlain v. Thompson, 10 Conn., 243; Elmore v. Austin, 2 Root, 499. But in Massachusetts the court has no jurisdiction in equity, in cases founded only in mistake. Gould v. Gould, 5 Metc., 274. And in Maine this head of jurisdiction has been expressly conferred on the court. Robinson v. Sampson, 23 Me., 388.

§ **725**. The cases of mistake have, it is true, seemed to present rather peculiar difficulties to the admission of parol evidence, because it has been argued that to do so is to overrule the Statute of Frauds and to contradict the writing by parol. Its admission is, however, the settled doctrine of the court, and that not merely for purposes of defense to a specific performance, but, as we shall hereafter see, for the purpose of correcting the mistake.[1] The question of its admission by way of defense was much debated in the case of the Marquis Townshend v. Stangroom,(*e*) where Lord Eldon said, "It cannot be said, that because the legal import of a written agreement cannot be varied by parol evidence, intended to give it another sense, therefore, in equity, when once the court is in possession of the legal sense, there is nothing more to inquire into. Fraud is a distinct case, and perhaps more examinable at law: but all the doctrine of the court as to cases of unconscionable agreements, hard agree-

(*e*) 6 Ves., 328.

[1] It is a well established rule in this country that parol evidence is always admissible, to vary or explain written agreements founded in mistake: and this notwithstanding it is excluded by the general laws of evidence; it is an exception to the prevailing rule. Peterson v. Grover, 20 Me., 363; Blanchard v. Moore, 4 J. J. Marsh., 471; Huston v. Stable, id., 130; Anderson v. Bacon, 1 A. K. Marsh., 48; Perry v. Pearson, 1 Humph., 431; Chamness v. Crutchfield, 2 Ired. Ch., 148; Harrison v. Howard, 1 id., 407; Van Ness v. City of Washington, 4 Pet., 232; Gibson v. Watts, 1 McC. Ch., 490; Goodell v. Field, 15 Verm., 448. Though there are cases of a different purport. Harris v. Dinkins, 4 Dessau, 60; Wesley v. Thomas, 6 Har & J., 24; Watkins v. Stockett, 6 id., 435; Sutherland v. Crane, Walk. Ch., 523. But parol testimony of what took place immediately before the execution of a written instrument, is inadmissible for the purpose of proving mistake in drawing the instrument, but not even in a clear case of departure from instructions in drawing the instrument, against a *bona fide* purchaser for a valuable consideration, claiming under the instrument and without notice of the mistake. Scott v. Burton, 2 Ash., 312. Parol evidence is inadmissible to show a mistake in law as a ground for reforming a written instrument founded on such mistake. Wheaton v. Wheaton, 9 Conn., 96. Therefore, where it was stated in a bill in chancery, brought by A. against B., his father, that it was agreed between the parties that A. should purchase of B. a farm of the value of $4,000, for which A. should give B. two promissory notes, one for $2,000, payable on demand, with six per cent interest, the other for the same amount, with five per cent interest, payable at the decease of B., and then to be delivered up unpaid to A. as his portion of B.'s estate: and the parties thereupon applied to a justice of the peace to draw the writing necessary to carry such agreement into effect, but by accident and through their own want of knowledge, they failed to give him the information requisite for this purpose, and he drew the last mentioned note payable in three years, and omitted the stipulation that it should be delivered up at the death of B. unpaid, which note was signed by A., he being ignorant of the operation of law thereon; that B. had brought an action on such note, and was endeavoring to enforce the collection of it, praying for an injunction and other relief, it was held: 1. That the alleged mistake was not a mistake in any matter of fact, but a mere matter of law 2. That parol evidence was inadmissible to prove the agreement set forth, and consequently that the bill must be dismissed. Id.

ments, agreements entered into by mistake or surprise, which, therefore, the court will not execute, must be struck out, if it is true, that because parol evidence should not be admitted at law, therefore it shall not be admitted in equity upon the question, whether, admitting the agreement to be such as at law it is said to be, the party shall have a specific execution, or be left to that court, in which, it is admitted, parol evidence cannot be introduced "(*f*) "No person," said Lord Redesdale, "shall be charged with the execution of an agreement, who has not, either by himself or his agent, signed a written agreement; but the statute does not say that if a written agreement is signed, the same exception shall not hold to it that did before the statute."(*g*)

§ **726**. It follows, from what has been stated, that where the defendant has been led into any mistake or error, the plaintiff cannot enforce the contract with the mistake. Therefore, where, in a sale by auction, the plaintiff had induced the defendant, who was the vendor, to think that he should not bid, and so put him off his guard, and the estate was, by a misapprehension on the part of the person employed to make the reserved bidding, allowed to be knocked down to the plaintiff, the court, on the ground of mistake, though there was no fraud, declined to enforce the sale.(*h*) In another case, the estate was sold in lots: the particular stated that the timber on lots four and five was to be taken at a valuation: in addition to this, one of the conditions of

(*f*) 6 Ves., 333. Accordingly Manser v. Back, 6 Ha., 443.
(*g*) In Clinan v. Cooke, 1 Sch. & Lef., 39.
(*h*) Mason v. Armitage, 13 Ves., 25; Pym v. Blackburn, 3 id., 34; Day v. Wells, 30 Beav., 220.

[1] The utmost good faith is required by equity in these cases; and therefore in sales of property, for instance, the seller is bound to act strictly in fairness, and if he mislead the purchaser by a false or mistaken statement as to any one essential circumstance, the sale is voidable. Dogget v. Emerson, 3 Story, 100. Even a mistake of the legal effect of an instrument will be relieved against when it can be shown to have been brought about by the misrepresentations or false assurances of the plaintiff. Broadwell v. Broadwell, 1 Gilm., 599; see, also, Drew v. Clarke, Cooke, 374; Callendar v. Colegrove, 17 Conn., 1, is a forcible authority on this point, where a *plaintiff* sought relief on these grounds. On a bill charging a combination between the defendant and others to defraud the plaintiff, in the sale of a mercantile concern, a committee was appointed, which, without finding any fraudulent intent, stated in their report a train of circumstances brought about by the management of the defendant, by which the plaintiff was deceived and injured; and the court adjudged thereon that the contract of sale was fraudulent and void; but on a motion in error made by the defendant, it was held, as it appeared from the finding of the committee, the plaintiff entered into the contract from a mistake as to the real nature of the concern, in consequence of which the substantial object of the contract was defeated, this was sufficient ground for setting it aside.

sale specified that the purchaser was to take the timber (speaking generally without reference to any particular lot) at a valuation: Grant, M. R., said, that the express declaration as to lots four and five was so likely to mislead a purchaser as to the meaning of the conditions, that supposing that the right construction of the condition was that it applied to all the lots, it would be inequitable to enforce specific performance of the contract.(*i*)' Again, where(*j*) on a sale by auction, the plan annexed to the particulars of the property (a house and grounds) showed a shrubbery on the western boundary, and the defendant, going to inspect the property before the sale, with the plan in his hand, found on the western side a belt of shrubs with an iron fence outside it inclosing three ornamental trees, and he then bought the property, believing that the fence was the boundary, but the real boundary was a line of shrubs within the shrubbery and did not inclose the trees, the court of appeal held that the mistake was increased by at least *crassa negligentia* on the part of the vendors, and accordingly dismissed, with costs, their bill for specific performance.

§ **727**. In the preceding cases, it will be observed that the plaintiff contributed to the mistake of the defendant: and there is no doubt that the circumstance that the plaintiff has by his words or his silence, or in any way, contributed to the error of the defendant, even though he may have done so unintentionally, greatly strengthens the defendant's case.(*k*)

§ **728**. Even where the mistake is purely due to the defendant himself or his agent, the court will, in some cases, refuse specific performance:(*l*) indeed, it will sometimes furnish active assistance on the ground of the mistake of the party himself as well as of another, as is strongly shown by a case in which a professional man was held entitled as plaintiff to the rectification of an error in a deed of his own drawing.(*m*) The cases, too, on intoxication furnish an analogy to this doctrine: for that circumstance is a ground

(*i*) Higginson v. Clowes, 15 Ves., 516. See, too, per Jessel, M. R., in Jones v. Rimmer, 14 Ch. D., 592; Moxey v. Bigwood, 4 D. G. F. & J., 351; and cf. Phelps v. White, 5 L. R. Ir., 335.

(*j*) Denny v. Hancock, L. R. 6 Ch., 1

(*k*) Baskcomb v. Beckwith, L. R. 8 Eq., 100; cf. Caballero v. Henty, L. R. 9 Ch., 447; Bray v. Briggs, 20 W. R., 962.

(*l*) See per Jessel, M. R., in Jones v. Rimmer, 14 Ch. D., 592.

(*m*) Ball v. Storie, 1 S. & S., 210; cf. Cox v. Smith, 19 L. T. (N. S.), 517.

of defense, though it may have been in nowise brought about by the plaintiff.(*n*)[1]

§ **729**. On this principle, where a person, who was employed to bid for one of two distinct estates offered for sale at the same time and place, came into the auction-room, and after hearing the description of a lot which was perfectly different from that for which he was engaged to bid, kept bidding in a hasty and inconsiderate manner for, and ultimately purchased, this lot, which, by his own gross mistake, he thought to be the lot for which he was to bid, the court refused specifically to carry out the sale (*o*) And where a vendor by mistake offered to sell an estate for £1,100, which figure he had by a wrong addition reached instead of £2,100, the court refused the purchaser specific performance and dismissed his bill, without costs.(*p*)

§ **730**. So where a vendor had revoked the authority of the auctioneer as to part of the property, and the auctioneer inadvertently sold the whole, the court refused specific performance, though the purchaser was justified in believing that he purchased all he claimed by his bill.(*q*) Again, where a description of parcels was prepared by the vendor's solicitor from a previous description, which had been prepared by another solicitor on the report of a surveyor, and the description turned out to be erroneous as to quantity,

(*n*) See supra, § 384.
(*o*) Malins v. Freeman, 2 Ke., 25.
(*p*) Webster v. Cecil, 30 Beav , 62. As to the costs in this case, see per James, L. J., in Tamplin v. James, 15 Ch. D., 221. Such a mistake will not be a ground for opening biddings, which can now only be opened for fraud. Griffiths v. Jones, L. R. 15 Eq , 279.
(*q*) Manser v. Back, 6 Ha , 443.

[1] The Western R. R. Corp. v. Babcock, 6 Metc., 346, is an analogous case. It was there held that a defendant may show, that without gross laches of his own, he was led into a mistake by some uncertainty or obscurity of the descriptive part of the agreement, so that it applied to a different subject from that which he understood at the time, although he was not misled by any misrepresentation of the other party; or he may show that the bargain will operate in a different way from that which was contemplated by the parties when they executed it. But Mortimer v. Pritchard, 1 Bailey's Ch., 505, expresses, seemingly, a different view. It is said in that case that a mistake, such as would entitle a party to relief, must have been made under the influence of false appearances, and not merely from the suggestions of the party's own mind. The grounds of the decisions in Post v. Leet, 8 Paige, 337, made by Walworth, Ch., do not appear unapplicable to the point in question. There the terms of a sale, by a master, were that the lands were sold free from incumbrances, and that all taxes and assessments thereon should be paid out of the purchase money. Held, that the purchaser could not be compelled to take the land subject to an assessment, for a street, laid out and used by the public prior to the sale, *though the assessment had not been formally confirmed until afterwards*, it appearing that the purchaser *supposed such assessment included in the terms of the sale*, and a resale was ordered.

the court would not enforce the sale on the vendor, unless the case were one for compensation, and the purchaser would submit to it.(*r*) And where a vendor sold a manor, being at the time ignorant of its exact extent, and both parties at the time of the contract believed that what it included was something different from what it really did, and the manor proved to comprise valuable property that the vendor did not know to be within it, the purchaser's bill for specific performance was dismissed.(*s*)

§ **731**. Where a defendant was tenant for life of an estate, under a settlement which contained a proviso, that, if he purchased and settled an estate in fee simple in possession in some convenient place or places of a value equal to or greater than the estate comprised in the settlement, then this estate should become the property of the tenant for life; and he, imagining that he had, with the concurrence of his wife, an absolute power of disposition over the settled estate, entered into a contract for sale: Plumer, V. C., refused to carry it into effect by an exercise of the proviso in the settlement, considering that such a performance of the contract would be attended with great difficulty, and that the defendant had not contracted for that purpose or with that intention.(*t*)

§ **732**. In a case where a corporation was contracting by an agent, and he swore to his sense and understanding of the contract he entered into being to a certain effect which the contract did not justify, and a bill was filed against the corporation, one ground upon which Knight Bruce, L. J., dismissed an appeal against the corporation was this mistake of the agent.(*u*)

It would open a wide field of defense if every misapprehension of the legal effect of a contract furnished a valid one. But perhaps the court considers with more favor as a defense the allegation of mistake in an agent than in a principal.(*v*)

§ **733**. Where there has been no misrepresentation, and

(*r*) Leslie v. Tompson, 9 Ha., 268. See, also, per Lord Cottenham in Alvanley v. Kinnaird, 2 Mac. & G., 7; Helsham v. Langley, 1 Y. & C. C. C., 175; Neap v. Abbott, C. P. Coop. Rep. (1837, 1838), 333. And cf. McKenzie v. Hesketh, 7 Ch. D., 675.

(*s*) Baxendale v. Seale, 19 Beav., 601. See, too, Earl of Durham v. Legard, 34 Beav., 611; Richards v. North London Railway Co., 20 W. R., 194.

(*t*) Howell v. George, 1 Mad., 1 Cf. Hood v. Oglander, 34 Beav., 518, 519.

(*u*) Wycombe Railway Co. v. Donnington Hospital, L. R. 1 Ch., 268

(*v*) Per Turner, L. J., in Morrison v. Barrow, 1 De G. F. & J., 638.

there is no ambiguity in the terms of the contract, the defendant cannot be allowed to evade the performance of it by the simple statement that he has made a mistake.(*w*) In a case beford Lord Romilly, M. R., where the defendant alleged that he misunderstood the particulars of sale, his Lordship observed that "if there appear on the particulars no ground for the mistake, if no man with his senses about him could have misapprehended the character of the parcels, then I do not think it is sufficient for the purchaser to swear that he made a mistake or that he did not understand what he was about."(*x*) And so where, according to the true construction, the contract made the intended lease determinable at the option of either party, but the lessee insisted that he signed it in the belief that it gave the option to him only, the court overruled the defense based on the alleged mistake.(*y*)

§ **734**. So, again, where the property sold (an inn and shop) was described in the particulars as consisting of Nos. 454 and 455 on the tithe map, containing by admeasurement twenty perches more or less, and in the occupation of Mrs. K. and Mr. S.,—all which statements were correct—and correct plans of the property were exhibited at the auction; and the purchaser deposed that he did not see the plans, but had known the property from his boyhood, and bought it in the belief that it included two plots of garden ground which had for many years been occupied with the gardens behind the inn and shop respectively; it was held by Baggallay, L. J. (sitting for Malins, V. C.), and by the court of appeal that the purchaser was not entitled to be released from his bargain.(*z*) "If," said James, L. J., "a man will not take reasonable care to ascertain what he is buying, he must take the consequences. * * * It is not enough for a purchaser to swear 'I thought the farm sold contained twelve fields which I knew, and I find it does not include them all,' or, 'I thought it contained 100 acres and it only contains 80.' It would open the door to fraud if such a defense was to be allowed. Perhaps some of the cases on this subject go too far, but for the most part the

(*w*) Per Baggallay, L. J., in Tamplin v. James, 15 Ch. D., 217; Morley v. Clavering, 29 Beav., 84.

(*x*) Swaisland v. Dearsley, 29 Beav., 430. This statement of the law was cited and approved by Baggallay, L. J., in Tamplin v. James, 15 Ch. D., 218.

(*y*) Powell v. Smith, L. R. 14 Eq., 85.

(*z*) Tamplin v. James, 15 Ch. D., 215.

cases where a defendant has escaped on the ground of a mistake not contributed to by the plaintiff, have been cases where a hardship amounting to injustice would have been inflicted upon him by holding him to his bargain, and it was unreasonable to hold him to it."(*a*)

§ **735**. A mistake purely attributable to one party may furnish a defense to specific performance. It does not thence follow that it enables the party so falling into error unconditionally to rescind for such error. So, where the defendants sold to the plaintiffs 100 chests of tea ex *Star of the East*, and the sale was made by a sample produced by the defendants as from that ship when, in fact, it had nothing to do with that cargo, and the defendants gave notice that they would, on that account, treat the contract as void, the Court of Queen's Bench determined that there was no equity in the defendants simply to rescind the contract.(*b*)[1]

§ **736**. We may now proceed to consider the effect of a parol variation set up by the defendant as a ground for refusing the specific performance of a written contract alleged by the plaintiff. It depends on the particular circumstances of each case whether the variation "is to defeat the plaintiff's title to have a specific performance, or whether the court will perform the contract, taking care that the subject matter of this parol agreement or understanding is also carried into effect, so that all parties may have the benefit of what they contracted for.(*c*)

§ **737**. (1) Where the parol variation set up by the defend-

(*a*) 15 Ch. D., 221.
(*b*) Scott v. Littledale, 8 El. & Bl., 815.
(*c*) Per Lord Cottenham in London and Birmingham Railway Co. v. Winter, Cr. & Ph., 62; Smith v. Wheatcroft, 9 Ch. D., 223. Cf. Morgan v. Griffith, L. R. 6 Ex., 72.

[1] *Party defrauded may rescind.*] The party who would rescind a fraudulent contract, must return whatever he has received upon it, in order to recover what he has paid upon it; but if the other party has intangled himself by his own fraud, so that he cannot be restored to his original condition, he must bare the loss. Masson v. Bovert, 1 Den., 69; Arnold v. Nichols, 64 N. Y., 117; Eastman v. Plumer, 46 N. H., 464; Hammond v. Pennock, 6 N. Y., 145. Where a party has been defrauded in the purchase or sale of real property, he may rescind the contract, so as to restore the parties to the same situation they were in when the contract was made; or he may affirm the contract, so far as it has been executed, and claim a compensation for the fraud. Bradley v. Bosley, 1 Barb. Ch., 125. Some cases hold that the rescission must be made after the party has had a reasonable opportunity to discover the fraud, and that vigilance and care must be exercised. Ross v. Filterton, 6 Ohio, 287; Lepton v. Firtllock, 13 Alb. Law J., 27. But these cases must be considered in connection with the facts then presented, and do not establish any general rule applicable to all cases. Miller, J., in Baker v. Lener, 67 N. Y., 304.

ant shows that after the parties to the contract mutually agreed with one another, an error occurred in the reduction of the contract into writing, and it appears that the written contract varied according to the defendant's contention represents the true contract between the parties, the court will, it seems, enforce specific performance of the contract so varied.[1]

§ **738**. Thus, where a bill was brought for the specific performance of a contract to grant a lease at a rent of £9 per annum, and the defendant insisted that it ought to have been a term of the contract that the plaintiff should pay all taxes: Lord Hardwicke granted specific performance, and directed that the terms of the verbal contract should be carried into effect by the covenants to be inserted in the lease.(*d*) Again, where a bill prayed the execution of a contract for the sale of an estate, and the defendant resisted, and proved parol declarations by the auctioneer as to a right of common, and that previously to the sale the particular had been altered as to a certain right of common; the plaintiff proposed that his bill should be dismissed, but Lord Eldon pursued the court which the defendant insisted on, which was specifically performing the contract as contended for by the defendant, thus saving the expense of a cross-bill.(*e*)

§ **739**. (2) But where the mistake or parol variation set up by the defendant does not show a mere mistake in the reduction of the contract into writing, but that one party understood one thing and the other another, there is no such contract as the court will enforce, and the plaintiff's action is consequently dismissed.

(*d*) Joynes v. Statham, 3 Atk., 388.

(*e*) Fife v. Clayton, 13 Ves., 546. See, also, Gwynn v. Lethbridge, 14 id., 585.

[1] Bradford v. Union Bank of Tennessee, 13 How. (U.S.), 57 is an ample authority, upon this branch of equity. It is laid down in that case, that where one party to a contract in writing, brings a bill in equity for a specific performance thereof, and the defendant in his answer, submitting to a specific performance of the real agreement, alleges that the written contract was entered into by mistake, and under a misapprehension of the facts, and establishes this by evidence, he is entitled to a specific performance of the agreement as proved, even against the claim of the plaintiff to have his bill dismissed. See Bradbury v. White, 4 Green, 391. Upon this same principle, in Arnold v. Arnold, 2 Dev. Ch., 467, where a vendor of a chattel received payments by the vendee, with notice that he mistook the price of the sale, the court compelled a conveyance in favor of the vendee, at the price understood by him See Ferussac v. Thorn, 1 Barb. Sup. Ct. R., 44; Wells v. Kruger, 5 Paige, 164.

Therefore, where the court thought that the plaintiff and defendant had both been mistaken in a contract which contained certain ambiguous conditions as to the payment for timber, the bill was dismissed.(*f*)

§ **740**. The same result follows where, from any other circumstance, the enforcement of the parol variation set up by the defendant would be unfair on either party. Accordingly, where the plaintiff set up a contract which the defendant successfully resisted by parol evidence of a subsequent contract, and the plaintiff insisted on a performance of the contract so set up; Strange, M. R., refused to grant it, on the grounds that it would be a surprise on the defendant to insist, under the prayer for general relief, on the performance of a contract which was not put in issue by the record, and that the plaintiff had really caused the litigation by his refusal to adopt the real contract.(*g*) Again, where the defendant proved a parol variation, and a great lapse of time had occurred, and compensation in respect of the term in dispute must have been allowed, if the contract had been enforced, for the period whilst the doubt about the terms of the contract had been subsisting, the plaintiff's bill was dismissed, but without costs.(*h*)[1]

So in Lindsay v. Lynch,(*i*) where the plaintiff had refused throughout to adopt the contract which the defendant ad-

(*f*) Clowes v. Higginson, 1 V. & B., 524. See the judgment in this case observed on by Lord St. Leonards, Vend., 133, and by Stuart, V. C., in Dear v. Verity, 17 W. R., 568. See, too, Butterworth v. Walker, 13 W. R., 168.

(*g*) Legal v. Miller, 2 Ves. Sen., 299. See the statement of this case by Grant, M. R., in Price v. Dyer, 17 Ves., 364.

(*h*) Garrard v. Grinling, 2 Sw., 244.

(*i*) 2 Sch. & Lef., 1, 10-11. See Jeffery v. Stephens, 6 Jur. (N. S.), 947; 8 W. R., 427; Smith v. Wheatcroft, 9 Ch. D., 223.

[1] Where there is doubt whether the parties understood the contract alike, specific performance will be denied. Therefore, where a block of land, which had been subdivided into several distinct lots, was put up and sold at auction, and was struck off to the purchaser at a specific sum, and the vendor, upon a bill filed for a specific performance, insisted and proved that the premises were put up and sold by the lot, and the purchaser, in his answer, insisted that the premises were put up as one entire parcel, and he bid for the premises at a price which was for the entire block; and the evidence was such as to render it doubtful whether the defendant understood that the premises were put up and sold by the lot, the court decided that the complaint was not entitled to a specific performance of the contract. Coles v. Bowne, 10 Paige, 526. See James v. The State Bank, 17 Ala., 69; Story's Eq. Jur., § 134; Lyman v. United States Insurance Company, 17 John., 383, is an authority of the same nature. There, the appellants applied to the respondents for insurance on a brig, as a *Portugese* vessel; but the policy was made out for an *American* vessel. It was apparent that there was no fraud in the case, but that the parties had contracted in mutual misunderstanding and error. Platt, J., was, therefore, of the opinion that clearly no relief could be granted.

mitted, the bill was dismissed, but without prejudice to another bill.

§ **741**. (3) Where, as is often the case, the court does not decide that the parol variation falls clearly under either of the previous cases, but merely that the defendant contracted under mistake, it puts the plaintiff to his election either to have his action dismissed, or to have the contract executed with the parol variation.(*j*)

§ **742**. Thus, in Higginson v. Clowes,(*k*) where the conditions of sale were likely to have misled the defendant, and the defendant contended for a different construction from that of the plaintiff, Grant, M. R., offered the plaintiff either to have his bill dismissed, or to have the contract executed on the defendant's construction. The counsel for the defendant contended that it was not competent to the plaintiff to have his bill dismissed, but that the defendant, without filing a cross-bill, might have a specific performance of the contract. Grant, M. R., however, held that that right existed where the defendant's construction was adopted by the court; but that where, as in the case before him, the court did not decide that the defendant's construction was right, but only that he had contracted under a mistake created by the plaintiff, the bill was merely dismissed. In a subsequent suit on the same contract, where the parties were inverted, Plumer, V. C., holding that there had been a mistake on both sides, refused specific performance on the construction of the defendant in the first suit.

§ **743**. In Ramsbottom v. Gosden,(*m*) where the written contract confined a reference of expenses to those of conveyance, but the defendant proved by the parol evidence of the attorney that it was the intention of both parties that the plaintiff, who was the purchaser, should also pay the expenses of making out the defendant's title, Grant, M. R., put the plaintiff to his election, either to have the contract performed in the way contained for by the defendant, or to have his bill dismissed. And in a subsequent case, where the defendant proved a parol variation, the same judge

(*j*) See, in addition to the cases cited infra, Browne v. Marquis of Sligo, 10 Ir. Ch. R., 1.
(*k*) 15 Ves., 516.
(*l*) 1 V. & B., 524.
(*m*) 1 V. & B, 165. Query, why was not specific performance enforced on the defendant's contention, as the error appears to have been merely in the reduction of the contract into writing?

again left the plaintiff either to have a specific performance with this variation, or to have his bill dismissed.(*n*)

§ **744**. In a case where parol evidence was admitted on behalf of the defendants to show that a contract by several persons to enter into bonds in £1,500 ought to have been for one joint bond in that amount by all; Plumer, V. C., left it to the plaintiff to have his bill dismissed, or to take a decree for the joint bond, or to take an issue on which the witnesses could be examined.(*o*)

§ **745**. In Clarke v. Moore,(*p*) where a landlord sought specific performance of a contract for a lease, and the defendant set up a parol contract to abate the rent, to which the plaintiff at the bar submitted, the lease was directed with the abatement and each party was left to bear his own costs: and in another case, where it appeared that, in addition to the written contract, there had been an understanding between the agent of the plaintiff and the defendant as to payment for timber and certain expenses, the plaintiff consenting to adopt the terms as part of his contract, specific performance was granted.(*q*)

§ **746**. Where there is a stipulation which one of the contracting parties may reasonably have understood to be implied in the contract, and did so understand—as, for instance, the insertion of a usual clause in a lease—specific performance will not be enforced against such party except with such condition included.(*r*) And where a plaintiff sought relief on the ground of a covenant for renewal, which had for one hundred and fifty years been acted on in a manner different from its terms—namely, by continually increasing the fine, and not the rent: the court held that the covenant could not be carried into execution according to its original terms, but might be on the plaintiff's submitting to a conscientious modification of it, to meet the circumstances of the case.(*s*)[1] In this instance acquiescence, and not mistake, was the ground of the variation.

(*n*) Clarke v. Grant, 14 Ves., 519. As to this case see Dear v. Verity, 17 W. R., 569.
(*o*) Lord Gordon v. Marquis of Hertford, 2 Mad., 106.
(*p*) 1 Jon. & L., 723.
(*q*) London and Birmingham Railway Co. v. Winter, Cr. & Ph., 57; cf. Barnard v. Cave, 26 Beav., 253; Donald v. Scott, 10 Ir. Ch. R., 496. Distinguish Snelling v. Thomas, L. R. 17 Eq, 303.
(*r*) Ricketts v. Bell, 1 De G. & Sm., 335. Consider Chappell v. Gregory, 34 Beav., 250.
(*s*) Davis v. Hone, 2 Sch. & Lef., 341.

[1] And a court of equity is competent to correct or reform any material mistake, in agreements or deeds, occasioned by the omission or insertion of material

§ **747**. The parol variation may be alleged by the plaintiff for the purpose of offering the defendant his election ;(*t*) or it may be set up by the defendant by way of defense. If, in the absence of its being thus alleged, it comes out on the evidence, the court will inquire into it before disposing of the case.(*u*) The court will do the same where the variation is alleged by the defendant, and so far proved as to raise a suspicion of its existence, and yet not to satisfy the court.(*v*)

§ **748**. From the great danger which would otherwise arise, the court will not allow a person to escape from a written contract on slight parol evidence of mistake on his own part. So in one case Lord Hatherley (then V. C.) said

(*t*) Robinson v. Page, 3 Russ., 114.
(*u*) Parken v. Whitby, T. & R., 366; London and Birmingham Railway Co. v. Winter, Cr. & Ph., 57; cf. Helsham v. Langley, 1 Y. & C. C. C., 175.
(*v*) Van v. Corpe, 3 My. & K., 269.

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stipulations, whether it be simply upon parol testimony or more cogent proof. Tilton v. Tilton, 9 N. H., 385. Wemple v. Stuart, 22 Barb., 154, is an important case in illustration. The action was commenced to recover damages for the non-performance of a contract made by the defendants, with Gardinier and Vandenburgh, of whom the plaintiff, Wemple, was the assignee, in which the defendant sold and agreed to deliver to Gardinier and Vandenburgh certain merchantable plank to the amount of 30,000. The defendant further agreed to deliver to G. and V., in addition to this quantity, all the merchantable plank of the description agreed between them, that they, the defendants, might saw at their mill the ensuing winter, at certain prices. The complaint alleged a neglect and refusal by the defendants to perform the contract. It also alleged an assignment by G. and V. to the plaintiffs The defendants, in their answer, alleged that it was the intention of the parties to the contract to sell and purchase the plank which the defendants then had at their mill, to the number of 30,000, if they had so many, and if not, then it was the intention of the defendants to sell, and of G. and V. to purchase the plank they then had sawed at the mill and no more. And the defendants insisted that such contract should be so construed, and should be reformed in accordance with such intention. This allegation was not denied in the reply of the plaintiffs. Paige, J., in deciding the case, said: "The statements in the answer show no right to demand a reformation of the contract, by conforming to the alleged intention of the parties. A written contract, in the absence of fraud, can only be reformed where it is shown, by satisfactory proof, that there is a plain mistake in the contract, by the accidental omission or insertion of a material stipulation, contrary to the intention of both parties, by expressing something different in substance from the truth of that intent, and under a mutual mistake. 1 Story's Eq. Jur., §§ 152, 155, 156, 157; 2 John.'s Ch., 595. The answer, in setting up the mistake in the written contract, should have stated that the parties agreed to sell and purchase only the plank which the defendants then had at their mill; and then should have alleged that in reducing the contract to writing, this limitation of the quantity sold and purchased was accidentally omitted, contrary to the intention of the parties: merely alleging that the parties intended to sell and purchase the plank then at the mill of the defendants, is not sufficient to entitle the defendants to a reformation of the contract in accordance with that intention. To show that a written contract does not conform to the actual agreement made and intended to have been reduced to writing, the actual agreement should be stated, and the mistake in reducing it to writing alleged." Perhaps this case, in requiring the omission or insertion of the stipulation to be contrary to the intention of *both* parties, may be somewhat more restricted than the rule adopted in the text.

that the oath of the defendant that he had inserted in his letter a term which he in fact omitted, and the oath of his agent that he had received instructions to the like effect, in letting the house, would not have sufficed; but the defendant having in his letter referred to the offer as having been previously made to another party, and that party swearing that in the offer as made to him the term omitted in the subsequent offer was contained, the court held that sufficient evidence of mistake on the defendant's part had been given, and allowed the defense.(*w*)

§ **749**. The common error, or mistake of both parties, as to the subject matter of the contract is, on the principles already stated, a clear ground for resisting specific performance: so where the plaintiff being entitled to estates during the life of A. entered into a contract with regard to the timber on the estates with the remainderman; and it subsequently appeared that A. was at the time dead, though this circumstance was unknown to both parties; Lord Romilly, M. R., and afterwards the lords justices refused specific performance and dismissed the bill with costs.(*x*)

§ **750**. Further, where both parties to a contract are, at the time of the contract, in mistake or error as to the matters in respect of which they are contracting, this will not only furnish a ground for resisting specific performance, but enable the court to rescind the contract.(*y*)

§ **751**. Thus, in Calverley v. Williams,(*z*) Calverley brought his bill against Williams for a conveyance of seven acres of copyhold land, part of an estate sold by auction and purchased by the plaintiff as being comprehended in the advertisement of the sale, and described as in the possession of Groombridge. The defendant resisted this claim, on the ground that he did not intend to include those seven acres, or know that they were in the possession of Groombridge. Lord Thurlow, in giving judgment, said, "No doubt, if one party thought he had purchased *bona fide*, and the other party thought he had not sold, that is a ground to set aside

(*w*) Wood v. Scarth, 2 K. & J., 33.

(*x*) Cochrane v. Willis, 34 Beav., 359; L. R. 1 Ch., 58. Cf. per Turner, L. J., in Murrell v. Goodyear, 1 De G. F. & J., 449.

(*y*) See Torrance v Bolton, L. R. 14 Eq., 124; 8 Ch., 118. In Jones v. Clifford (3 Ch. D., 792), Hall, V. C., intimated the opinion that the court would, even in the case of a completed contract, give relief against a common mistake in the same way as it would against fraud. Cf. Leuty v. Hillas, 2 De G. & J., 110.

(*z*) 1 Ves. Jun., 210; per Lord Erskine in Stapylton v. Scott, 13 Ves., 427. See, too, Davis v. Shepherd, L. R. 1 Ch., 410; Price v. Ley, 4 Giff., 235, affirmed 11 W. R., 475.

the contract, that neither party may be damaged; because it is impossible to say, one shall be forced to give that price for part only which he intended to give for the whole, or that the other shall be obliged to sell the whole for what he intended to be the price of part only."[1]

§ **752**. Again, where both vendor and purchaser of an alleged estate in fee in remainder on an estate tail, were ignorant that at the time the tenant in tail had suffered a recovery, so that, in fact, no estate in remainder existed, the court rescinded the contract.(*a*)

And where A. proposed certain terms of assurance to the agent in London of a Scotch insurance office, and by mistake wrote down other terms in his proposal, to which proposal the Scotch office assented, the court at the instance of A. (refusing to reform the contract) rescinded it, and directed the repayment of the premiums paid.(*b*)

§ **753**. In a case brought before the House of Lords on appeal from Ireland, the appellant believing himself to be

(*a*) Hitchcock v. Giddings, 4 Pri., 135.

(*b*) Fowler v Scottish Equitable Life Insurance Society, 28 L. J. Ch., 225; 7 W. R., 5.

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[1] So where the consideration of a covenant to pay an annuity, was the conveyance to the covenantor of a tract of land on the right bank of the Ohio river, stated to embrace a coal mine, and the sole inducement to the purchase was the supposed existence of the coal mine, and it was finally ascertained that no coal mine was embraced within the bounds, equity enjoined perpetually a prosecution at law, to recover the annuity. Dale v. Roosevelt, 5 John.'s Ch., 164; S. C., 2 Cow., 129. In Marvin v. Bennett, 8 Paige, 312, although relief was denied in that particular case, because neither party professing to know the exact quantity of land to be conveyed, the words *more or less* were inserted in the deed for the express purpose of covering any deficiency that there might be, it was distinctly said by the chancellor that courts of equity give relief in cases of mutual mistake, unaccompanied by fraud, when the property which one party intended to sell, and the other intended to buy, did not in fact exist; or where the subject matter of the sale is so materially variant from what the parties supposed it to be, that the substantial object of the sale and purchase entirely fails. The rule is otherwise where the parties cannot be put in *statu quo*. Thus, where land was sold by an agent of the owner, who, by mistake, included in the conveyance an adjoining lot, which he and the purchaser supposed to be the property of his principal, but which was not his, and the principal executed the deed without detecting the error, and, afterward, upon discovering the mistake, filed a bill for correction, it was held that, because the parties could not be placed in *statu quo*, the sale could not be rescinded; and consequently that the bill could not be supported. Rankin v. Atherton, 3 Paige, 143. In Keyton v. Brawford, 5 Leigh, 39, by the mistake of both parties, the description of boundaries of land, in a deed of conveyance, included land of a conterminous proprietor, and the grantee took possession and occupied such land as the grantor had before occupied. It was held that the mistake in the description in the deed should be corrected, but that the vendee was not entitled to any relief on account of the land so by mistake included in the conveyance. See, also, Long v. Israel, 9 Leigh, 556, and Irick v. Fulton, 3 Gratt., 193.

a stranger to a fishery, agreed to take a lease of it; the respondents believing themselves to be entitled to the property agreed to grant the lease; it turned out that the appellant was entitled to the property and not the respondents, and the house declared that the contract was entered into by the parties to it under mistake and in ignorance of the actually existing rights and interests of the parties in the fishery, and that the contract was not binding in equity upon the appellant and respondents, but ought to be set aside subject to certain terms which the special circumstances of the case and the principles of good conscience were held to impose.(*c*)

§ **754**. But where neither party to the contract is in error as to the matters in respect of which they are contracting, and there is an actually concluded contract, but there is an error common to both the parties in the reduction of the contract into writing, there the court interferes for the purpose of reforming the contract, and not of rescinding it.(*d*) For by so doing neither party will be damaged; whereas, by enforcing it as it stood, one party would be necessarily injured; and by rescinding it, both would be deprived of the benefit of the contract.[1]

(*c*) Cooper v. Phibbs, 17 Ir. Ch. R., 73; L. R. 2 H. L., 149; infra, § 770. See, also, Bingham v. Bingham, 1 Ves. Sen., 126; Raffles v. Wichelhaus, 2 H. & C., 906; Earl Beauchamp v. Winn, L. R. 6 H. L., 223.
(*d*) Murray v. Parker, 19 Beav., 305.

[1] The interposition of a court of chancery to correct mistakes, by ordering a proper deed to be executed, according to the true intent of the parties, is a very ancient doctrine. If, on inquiry, it appears that the instrument does not contain what the parties intended it should, and understood that it did, it may be reformed by *aliunde* proof, so as to make it the evidence of what was the true bargain between the parties. It is wholly immaterial from what cause the defective execution of the intent of the parties arose. And mistakes of scriveners in drawing deeds or agreements, will be corrected, even against *bona fide* creditors of the grantor. Wyche v. Greene, 16 Geo., 49; Alexander v. Newton, 2 Gratt., 266; Parham v. Parham, 6 Hump., 287; Perkins v. Dickinson, 3 Gratt, 335; Rogers v. Atkinson, 1 Kelly, 12; Collier v. Lanier, 1 id., 238; Wooden v. Haviland, 18 Conn., 101; Clopton v. Martin, 11 Ala., 187; Webster v. Harris, 16 Ohio, 490; Best v. Stow, 2 Sand.'s Ch., 298; Mosby v. Wall, 23 Miss., 81; Pugh v. Chesseldine, 11 Ohio, 109; Willis v. Henderson, 4 Scam., 13; Hunt v. Rousmanier, 1 Pet., 1; Chamberlain v. Thompsons, 10 Conn., 243; Cobb v. Preston, 2 Root, 78; Chapman v. Allen, Kirby, 399. In Ohio this remedy is at law. Carr v. Williams, 10 Ohio, 223. Of course, as equity has no jurisdiction in cases of mistake in Massachusetts, error in the reduction of an agreement to writing is necessarily excluded; and the court will also refuse so to amend agreements as incidental to its jurisdiction in regard to disputes between parties. Leach v. Leach, 18 Pick., 68. Mistakes in instruments will be corrected against sureties as well as others. Butler v. Durham, 3 Ired.'s Ch., 589; Newcomer v. Kline, 11 Gill. & J., 457. But it seems that a mistake will not be corrected to the prejudice of innocent parties, who had no notice of the mistake. United States v. Munroe, 5 Mason, 572.

§ **755**. Accordingly, in a case already stated, where the question was whether a certain seven acres were or were not included in the contract, Lord Thurlow, after stating that if the parties to the contract had mistaken each other in this respect, it must be rescinded, said: "Upon the other hand, if both understood the whole was to be conveyed, it must be conveyed. But again, if neither understood so—if the buyer did not imagine he was buying, any more than the seller imagined he was selling, this part, then this pretence to have the whole conveyed is as contrary to good faith upon his side, as the refusal to sell would be in the other case."(*e*)

§ **756**. The jurisdiction of the court in this respect was clearly asserted by Lord Hardwicke in the case of Henkle v. Royal Exchange Assurance Co.,(*f*) which was a bill seeking, after the loss, so to rectify a policy, on the ground of common mistake, as to turn the loss on the insurer, which but for such variation must have been borne by the insured. "No doubt," said his lordship, "but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing, as well as against frauds in contracts: so that if reduced into writing contrary to intent of the parties, on proper proof that would be rectified:" but for want of such proper proof the bill was dismissed.

§ **757**. In another case, before the same judge, the captain of an East India ship, by articles of agreement, bargained and sold all his china-ware and merchandize brought home in his last voyage to the defendant: the articles of agreement were drawn up, from minutes made by the parties, by an attorney, who, misunderstanding the transaction, drew up the articles in an erroneous and absurd manner: the captain, who was the party aggrieved by the error, brought his bill for an account of what was due on the contract, and insisted on its rectification: he was allowed to give parol evidence of the error and of the usage of trade, to show the nature of the real transaction and the consequent mistake in the articles.(*g*)

§ **758**. It follows, from the nature of the jurisdiction, that there can be no rectification where there is not a prior actual contract by which to rectify the written document: so that,

(*e*) Calverley v. Williams, 1 Ves. Jun., 210.
(*f*) 1 Ves. Sen., 317.
(*g*) Baker v. Paine, 1 Ves. Sen., 456; 6 Ves., 336 n.

for instance, a policy cannot be rectified (*h*) by the slip, because the slip constituted no contract, and there was no contract till the policy was signed and the premium paid.(*i*)

§ **759**. It equally follows, that the mistake of one party to a contract can never be a ground for compulsory rectification. It may be a reason for setting the whole thing aside, but never for imposing on one party the erroneous conception of the other.(*j*)

§ **760**. However, in two cases decided by Lord Romilly, M. R., in each of which the mistake was, according to the defendant, on the side of the plaintiff only, and the deed of conveyance had been executed, his lordship held that, though the plaintiff was not entitled to compel rectification, the defendant must elect between having the transaction annulled altogether and submitting to the rectification of the deed in accordance with the plaintiff's intention.(*k*)

§ **761**. Parol evidence is admitted to show the common mistake of both parties in reducing the contract into writing, and as the ground for rectifying it.[1] "I think it im-

(*h*) See Morocco Land, etc., Trading Co. (Limited) v. Fry, 13 W. R., 310.
(*i*) Mackenzie v. Coulson, L. R 8 Eq., 368
(*j*) Sells v. Sells, 1 Dr. & Sm., 42; Rooke v. Lord Kensington, 2 K. & J., 753; Thompson v. Whitmore, 1 J. & H., 268; Earl of Bradford v. Earl of Romney, 30 Beav , 431.
(*k*) Garrard v. Frankel. 30 Beav., 445; Harris v. Pepperell, L. R. 5 Eq., 1. In his judgment in the latter case Lord Romilly, M. R. points out the distinction between the decisions in Garrard v. Frankel and Earl of Bradford v. Earl of Romney (30 Beav., 431).

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[1] *Reason for reforming written instrument by parol*] "The principle on which courts of equity rectify an instrument so as to enlarge its operation, or to convey or enforce rights not found in the writing itself, and make it conform to the agreement as proved by parol evidence, on the ground of an omission by mutual mistake in the reduction of the agreement to writing, is, as we understand it, that in equity the previous agreement is held to subsist as a binding contract, notwithstanding the attempt to put it in writing." Wells, J., in Glass v. Hulbert, 102 Mass., 24.

Parol proof to reform writing must be very strong.] Where it is sought to reform a written instrument on the ground of mistake, by parol, the evidence must be very clear and positive. It must, as some of the cases say, "leave no doubt of the mistake." Lord Eldon said, in Marquis of Townshend v. Standgroom, 6 Ves., 333, that the evidence must be the strongest possible." Kent, Ch., in Gillespie v. Moon, 2 John.'s Ch., 585, said, after a careful review of all the then law on this subject: "The cases concur in the strictness and difficulty of the proof." Lord Thurlow said, in Shelburne v. Inchiquin, 1 Bro. C. C., 338, "that the evidence must be strong and irrefragable." See under this head, Hinkle v. Royal Ex. Ass. Co., 1 Ves., 317; Vonillon v. States, 25 L. J. Ch., 875; Anderson v. Bacon, 1 J. J. Marsh., 48; Planque v. Guesnon, 15 La. An., 312; Guernsey v. Am. Ins. Co., 17 Minn., 104; Brady v. Parker, 4 Ired.'s Eq , 430; McDonald v. Starkey, 42 Ill., 442; Sawer v. Hovey, 3 Allen, 331; Goodell v. Field, 15 Vt., 448; Harrison v. Howard, 1 Ired.'s Eq., 407; Huston v. Noble, 4 J. J. Marsh., 130; Watkins v. Stocket, 6 Har. & John., 435; Landerdale v. Hallock, 7 Sm. & Marsh, 622; Ross v. Wilson, id., 753; Wurzburger

possible," said Lord Thurlow, "to refuse, as incompetent, parol evidence which goes to prove that the words taken down in writing were contrary to the concurrent intention of all parties.(*l*)

§ **762**. But in order thus to procure the rectification of a contract, the proof must be clear, irrefragable, and the "strongest possible."(*m*) As the point to be proved is that the concurrent intention of all the parties to the contract was different from that expressed by the written contract, the court will attentively regard the admission or denial of the defendant as one of those parties.(*n*) It need scarcely be added that the court will only act on parol evidence when satisfied that there is no existing writing which contains the original instructions or contract.(*o*)

§ **763**. Where there is a writing by which an executed deed is to be rectified, and in that writing, there is a term in respect of which there is a latent ambiguity, parol evidence may be admitted to explain it, and thus assist in the rectification of the deed.(*p*)

§ **764**. Mistakes are usually divided into mistakes of fact(*q*) and of law. The former kind have always been held to give occasion to the jurisdiction of equity in mistake.

§ **765**. As regard mistakes of law, the maxim usually referred to was *Ignorantia legis non excusat;* and the older authorities seem to show that courts of equity would neither set aside contracts for mistake in law,(*r*) nor allow such mistake to be set up as ground for resisting specific per-

(*l*) In Lady Shelbourne v. Lord Inchiquin, 1 Bro. C. C., 341.

(*m*) Henkle v Royal Exchange Assurance Co., 1 Ves. Sen , 317; per Lord Eldon in Marquis Townshend v. Stangroom, 6 Ves , 333; Vouilion v. States, 25 L. J. Ch., 875; 27 L. T., 268; Fallon v. Robins, 16 Ir. Ch. R., 422.

(*n*) 6 Ves , 334; Mortimer v. Shorhall, 2 Dr. & War., 363, 374. In Pitcairn v. Ogbourne, 2 Ves. Sen., 375, 379, the evidence was considered sufficient to overcome the defendant's denial. See, too, Garrard v. Frankel, 30 Beav., 445; Harris v. Pepperell, L. R. 5 Eq., 1.

(*o*) Lackersteen v. Lackersteen, 30 L. J. Ch , 5; 6 Jur. (N. S.), 1111.

(*p*) Murray v. Parker, 19 Beav., 305

(*q*) It may be observed that mistake of fact is not the less a ground for relief because the person who has made the mistake had the means of knowledge. Willmott v. Barker, 15 Ch. D , 97, 106.

(*r*) Marshall v. Collett, 1 Y. & C. Ex., 232, 238; Cockerell v. Cholmley, 1 R. & My., 418.

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v. Meric, 20 La. An., 415; Bradford v. Union Bank of Tenn., 13 How., 57; Hunter v. Bilyon, 30 Ill., 228; Selby v. Geine, 12 id., 69; Stine v. Sherk, 1 Watts & Serg., 195; Kurkenbeister v. Becket 41 Ill., 172; Clarey v. Babcock, 41 id., 271; Mills v. Lockwood, 42 id., 111; McCloskey v. McCormick, 44 id., 336; Terson v. Atlantic Mutual Ins. Co., 40 Mo., 33; Shrively v. Welch, 2 Oregon, 288; Lyman v. United Ins. Co., 17 John., 373; McMahon v Spangler, 4 Rand, 51.

formance of contracts in other respects free from objection.(*s*)[1]

§ **766**. This view of the law was thus stated by Lord Chelmsford in addressing the House of Lords in 1858.(*t*) "Mistake is undoubtedly one of the grounds for equitable interference and relief; but then it must be mistake not in matters of law, but a mistake of facts. The construction of a contract is clearly matter of law; and if a party acts upon a mistaken view of his rights under a contract, he is no more entitled to relief in equity than he would be at law.(*u*)

§ **767**. With the authorities referred to in the two last preceding sections may be compared those others, which show that a misrepresentation of law, at least if innocently made, does not bind and create any civil liability.(*v*)[2]

(*s*) Pullen v. Ready, 2 Atk., 587; per Lord Alvanley, M. R., in Gibbons v. Count, 4 Ves., 849; Stockley v. Stockley, 1 V. & B., 23, 30; Mildmay v. Hungerford, 2 Vern., 243. See, also, Bilbie v. Lumley, 2 East, 469; Croome v. Ledlard, 2 My. & K., 251; Price v. Dyer, 17 Ves., 356.

(*t*) Midland Great Western Railway of Ireland v. Johnson, 6 H. L. C., 810, 811.

(*u*) See Powell v. Smith, L. R. 14 Eq., 85.

(*v*) Rashdall v. Ford, L. R. 2 Eq., 750; Beattie v. Lord Ebury, L. R. 7 Ch., 777.

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[1] *Mistake as to the operation of law.*] Where a contract has been fairly entered into with full knowledge of all the facts, a mistake of the law will not in general be ground for resisting the specific performance of such contract. Marshall v. Collett, 1 Y. & C. Ex., 232, 238; Mildmay v. Hungerford, 2 Vern., 243; Leed v. Johnson, 25 L. J. Exch., 110; Cockerell v. Cholmeley, 1 R. & My., 418; Pullen v. Ready, 2 Atk., 587; Stockley v. Stockley, 1 V. & B., 23, 30; Gibbons v. Ganut, 4 Ves., 489; Mellus v. Duke of Dovenshire, 16 Beav., 257; Midland Gt. West Co. v. Johnson, 6 H. of Lds., 798; Wooden v. Haveland, 18 Conn., 101; Bank of U. S. v. Daniel, 12 Pet., 32; Lyon v. Richmond, 2 John.'s Ch., 60; Trigg v. Read, 5 Humph., 529; Genter v. Thoms, 1 Ired 's Eq., 195; Shafer v. Davis, 13 Ill., 395; Peters v. Florence, 38 Pa. St., 194; McMurry v. St. Louis Co., 33 Mo., 377; Heilbron v. Bissell, 1 Bailey's Ch., 430; Storrs v. Barker, 6 John.'s Ch., 166; Dow v. Rer, Spear's Ch., 413; Wentermute v. Snyder, 2 Green's Ch., 489; Bell v. Steele, 2 Humph., 148; Shotwell v. Murray, 1 John.'s Ch., 512; Brown v. Armistead, 6 Rand., 594; State v. Reigert, 1 Gill., 1; Dill v. Shahan, 35 Ala., 694; Gwynn v. Hamilton, 29 id., 233; Smith v. McDougall, 2 Cal., 586.

[1] A distinction has been taken between ignorance of the law and mistake of the law, which has caused no little diversity of opinion, and created considerable perplexity. In the first case, it has been said, relief will be granted; in the latter it will not. We take it to be the settled rule, at present, that no such distinction exists; and that ignorance of the law and mistake of the law are equally considered in courts of equity to form no groundwork for relief. A leading case in this country, upon this question, is Champlin v. Laytin, 18 Wend., 409, where the authorities upon the point in view were considered by Bronson, J. Landsdown v. Landsdown, Mosely, 364, is the oldest case which has sought to establish this distinction. The case was this: The second of four brothers died, and the eldest and youngest both claimed the estate. They referred the question to a school master, who decided that the youngest was entitled to the property, because lands could not ascend. Upon this, the parties agreed to divide the estate between them, and the eldest brother executed a release. The chancellor decreed that the deed should be delivered up, "be

§ **768**. Recent decisions, however, have lessened, if not destroyed the importance of the distinction between mis-

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ing obtained by mistake and misrepresentation. The facts are so briefly stated, that it is impossible to say, with certainty, on what ground the decision proceeded. If there was any intentional misrepresentation in the case, either about its facts or law, that would be a proper ground for affording relief; and it is stated in a report of the case, 2 Jac. & Walk., 205, that the complainant alleged in his bill that he had been surprised and imposed upon by his brother and the school master. And Justice Bronson continues further: "In the report by Mosely, Lord Chancellor King is made to say that the maxim of law, *ignorantia juris non excusat*, was in regard to the public: that ignorance cannot be pleaded in excuse of crime, but did not hold in civil cases. Mosely is not a book of very high authority 5 Burr., 2629; 3 Anstr., 861; and I think it much more probable that the case turned on the ground of surprise and imposition, than that the chancellor made use of the language imputed to him." Chief Justice Marshall cited this case in Hunt v. Rousmanier, when first before the court, 8 Wheat., 214, with the qualifying remark, 'if it be law,' and he added, that there were certainly strong objections to the decision. Mr. Justice Story, in commenting on the language imputed to Lord Chancellor King, says it is utterly irreconcilable with the well-established doctrine, both of courts of law and courts of equity." It may then be submitted that the distinction before us receives no support whatever from the case, which has been relied upon in its defense. Willard's Eq. Jur., p. 60; Lawrence v. Beaubien, 2 Bailey's S. C. R., 623, is a decision directly to the effect that such a distinction should be maintained, and relief granted in the one case and refused in the other. Bronson, J., is, however, of the opinion that the decision in that case "rests upon no solid foundation." And in Haven v. Foster, 9 Pick., 112, the point was elaborately discussed by counsel; and the court, though deciding the case upon other grounds, clearly held that the principle *ignorantia juris non excusat* was applicable alike to civil and criminal proceeding; that every man is presumed to know the law of the land. In Shotwell v. Murray, 1 John.'s Ch., 512, Kent, Ch., holds ignorance of the law to be a very dangerous plea, whether applied to rules of civil conduct or to duties of natural and moral obligation. The case of Hunt v. Rousmanier, 8 Wheat., 174, it is thought cannot be quoted as an authority to uphold the existence of any distinction between ignorance of the law and mistake of the law. Willard's Eq. Jur., p. 62. There are, however, other cases; and these are considered by Paige, senator, in Champlin v. Laytin, to a different effect from the opinion of Justice Bronson. "I am prepared," says the learned senator, "to assent to the proposition of the vice-chancellor, that a contract entered into under an actual mistake of the law on the part of both the contracting parties, by which the object and end of their contract, according to its intent and meaning, cannot be accomplished, is as liable to be set aside as a contract founded in mistake of matters of fact. The proper distinction, in my judgment, is taken in the case of Lawrence v. Beaubien, 2 Bailey's (S. C. R.), 623; Lowndes v. Chisholm, 2 McCord's (S. C. R.), 455 (1827), and Executors of Hopkins v. Maryck, 1 Hill.'s Ch. Cas. (S. C. R.), 250 (1833), between a mistake of the law and mere ignorance of the law. This question, it seems to me, was in those cases correctly decided." * * * Johnson, J., in Lawrence v. Beaubien, 2 Bailey, 623, says: "All the difficulty and confusion which have grown out of the application of the maxim *ignorantia juris neminem excusat*, appears to me to have originated in confounding the terms ignorance and mistake. The former is passive and does not presume to reason, but the latter presumes to know, when it does not, and supplies palpable evidence of its existence." He further says, in Executors of Hopkins v. Maryck, "that a mere ignorance of the law is not susceptible of proof, and therefore cannot be relieved; but that a mistake of law may be proved, and, when proved, relief may be afforded." Sparks v. White, 7 Humph., 86, seems, at least, in some degree, to present the true doctrine of equity upon this point. Mere ignorance of the law, it is there said, will not authorize a court of chancery to set aside a contract; but if that ignorance be superinduced by the other party, or if there be a misplaced confidence, or if advantage be taken of weakness of intel-

takes of fact and of law. In Stone v. Godfrey,(*w*) Turner, L. J., said that he felt no doubt that the court had power to relieve against mistakes in law as well as mistake in fact.

(*w*) 5 De G. M. & G., 76.

lect, these, with other influences, united with ignorance of the law, will be sufficient to justify the court in so doing. See Sims v. Lyle, 4 W. C. C. R., 320. Mistake of the law, as a rule, whatever may be the distinction between it and ignorance of the law, if any there may be, is not a ground of equitable relief. Beebe v. Swartwout, 3 Gilm., 162; Shotwell v. Murray, 1 John.'s Ch., 512; Wintermute v. Snyder, 2 Green's Ch., 489; Good v. Herr, 7 Watts & Serg., 253; Trigg v. Reade, 5 Humph., 529; Broadwell v. Broadwell, 1 Gilm., 599; Champlin v. Laytin, 18 Wend., 412; Willard's Eq. Jur., pp. 59, 60; Story's Eq. Jur., § 140. It is not to be denied, however, that there are cases to the contrary. In Crosier v. Acer, 7 Paige, 143, Walworth, Ch., expressed no decided opinion. His words were—"if this court can relieve against a mistake in law in any case where the defendant has been guilty of no fraud or unfair practice, which is at least very doubtful, it must be in a case in which the defendant has, in reality, lost nothing whatever by the mistake, and where the parties can be restored to the same situation, substantially, in which they were at the time the mistake happened." See, also, Hall v. Reed, 2 Barb.'s Ch., 500. But Lowndes v. Chisholm, 2 McCord's Ch., 455; Hunt v. Rousmanier, 8 Wheat., 174; Evants v. Strode, 11 Ohio, 480; Beardsley v. Knight, 10 Verm., 185; Goodell v. Field, 15 id., 448; McNaughten v. Partridge, 11 Ohio, 223; Alexander v. Newton, 2 Gratt., 266; Parham v. Parham, 6 Humph., 287, are sufficiently clear. Many of these cases may, however, have well been decided upon other grounds; as, for instance, the error of the draughtsman in reducing the contract to writing. And, indeed, it has been said that whatever exceptions there may be to the general rule, that equity will not relieve upon the ground of mistake of law, they will be found to have something peculiar in their character. Bank of United States v. Daniel, 12 Pet., 32; Hunt v. Rousmainier, 1 id., 115. But Paige, Senator, 18 Wend., 423, contends strenuously for relief in these cases. "I cannot see any good sense," said he, "in the distinction of granting relief against mistakes of fact, and refusing it in cases of acknowledged mistakes at law. Both, in my judgment, ought to be placed upon the same footing. If the principles of justice require relief in one case, they equally do in the other." The vice-chancellor, Sir John Leach, in Naylor v. Wench, 1 Sim. & Stu., 555, says: "If a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another, under the name of compromise a court of equity will relieve him from the effect of his mistake." Although the case of Hunt v. Rousmanier, ultimately turned on another question, 1 Peters' U. S. R., 13, yet the opinion of Chief-Justice Marshall in that case, as reported in 8 Wheat., 205, clearly shows which way was the inclination of his mind. He says, speaking of the case of Landsdown v. Landsdown, Mosely, 364, "that, as a case in which relief has been granted on a mistake in law, cannot be entirely disregarded. And he further says: "Although we do not find the naked principle that relief may be granted on account of ignorance of law, asserted in the books, we find no case in which it has been decided that a plain and alleged mistake in law is beyond the reach of equity. We are unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood by both parties, to say a court of equity is incapable of affording relief." And Washington, J., in the same case, 1 Peters, 15, in the conclusion of his opinion, says: "It is not the intention of the court to lay it down that there may not be cases in which a court of equity will relieve against a plain mistake arising from ignorance of law." It seems, however, that the learned senator proposed the adoption of certain qualifications. "If relief," it is said in his opinion, "was to be granted upon every allegation of a mere ignorance of the law, great embarrassments would arise in discriminating between the cases of actual ignorance and those of feigned ignorance. So where the ignorance or mistake of the law is only in one of the contracting parties, and the other party has not taken any advantage

§ **769**. Acting on this view, Lord Hatherley (when Vice-Chancellor) remitted to his original rights against Company A., a creditor of that company who had given up that right in consideration of the substituted security of Company B., which purchased the business of the first Company A., when that purchase was held void as *ultra vires*.(*x*)

§ **770**. The point has twice come before the House of

(*x*) Re Saxon Life Assurance Co., Anchor Case, 2 J. & H , 408.

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of the circumstances in making the contract, it would not be proper to grant relief against such ignorance or mistake; but where a contract is entered into under an actual and reciprocal mistake of law in both the contracting parties, by which the manifest intention of the parties cannot be accomplished, and which *ex æque et bono* ought not to be binding, and where such mistake is either acknowledged, or undoubted evidence of it is produced, I cannot see any good reason why relief should not be granted in equity to the same extent as is done in cases of mistake in matter of fact. The principles of natural justice require that the like relief should be granted in both cases. I would qualify the rule, however, as was done by Johnson, J., in Lawrence v. Beaubien, and deny relief if it appeared that the contract was the compromise of a doubtful right, or was entered into as a speculating bargain. By adopting the rule with these qualifications, in my judgment, no mischievous consequences would follow, but on the contrary, the interests of justice would be advanced." It may not be amiss to observe that in the very case of Naylor v. Winch, cited in this opinion, and which so broadly lays down the law in reference to compromises, relief was denied, because the claim was doubtful, and the compromise was after due deliberation. Story's Eq. Jur., § 121 (note 1). And it is also to be remembered that the positions of Chief-Justice Marshall were greatly shaken by Washington, J., when the case came before him, on appeal to the supreme court. Willard's Eq. Jur., 62. The words of Washington, J., cited also in the course of the opinion, do not necessarily imply that a court of equity will grant relief in usual cases of a mistake of law. They may have been used in order to include such cases as Mortimer v. Pritchard, 1 Bailey's Ch., 505, where a person lent money at a usurious rate of interest in mistake of the law, and the court granted him relief, because usury consists in the corrupt *intent to take illegal interest:* and this could not exist without a knowledge of the law. The dangers of breaking through the rule as it now stands, together with its general practical utility and equity, are best considered by Bronson, J. 18 Wend., 412. Nevertheless, in South Carolina, Kentucky and Maryland, men are not chargeable for want of knowledge of the law, and equity will relieve parties from their own acts and deeds, fairly done, on a full knowledge of facts, though under a mistake of law. Lowndes v. Chisholm, 2 McCord's Ch., 255; Hopkins Ex'rs v. Maryck, 1 Hill.'s Ch., 257; Drew v. Clarke, Cooke, 374; Fitzgerald v. Peck, 4 Litt., 125; Lamat v. Rowley, 6 Har. & John., 500; and see cases collected in C. & H. Notes, 1483, 1484; Gilbert v. Gilbert, 9 Barb , 534; Arthur v. Arthur, 10 id., 9; Mathews v. Terwilliger, 3 id., 50; Dupre v. Thompson, 4 id., 279. There are cases of apparent mistake of law, in respect of titles, where relief has been granted, but they are cases of a mixed nature; partly mistake of fact. Story, §§ 120, 121, 122. Money paid, with a full knowledge of facts, cannot be recovered back, on the ground that the party was ignorant of the law. Bilbie v. Lumley, 2 East, 469; Lowrey v. Bordieu, Doug., 467, per Buller, J.; Stevens v. Lynch, 12 East, 38; Busbane v. Dacres, 5 Taunton, 144; Clark v. Dutcher, 9 Cowen, 674; Jones v. Watkins, 1 Stewart, 81. Where a party has committed a *tort*, in consequence of a mistake of law, and the other party is free from fault, equity will not relieve the former from the legal consequences of his act. Pettes v. Bank of Whitehall, 17 Verm., 435. Though a party may not be relieved from a mistake of law, yet, if no new equities have intervened, the reverse will be the case in reference to a rule of court. Gardiner v. Schermerhorn, 1 Clarke, 101; Gaul v. Miller, 3 Paige, 192; Pratt v. Adams, 7 id., 615.

Lords in late years. In Cooper v. Phibbs,(*y*) where the appellant believing himself to be a stranger to his own land agreed to take a lease of it, and was relieved from his mistake, his belief was founded on an erroneous impression of the effect of certain documents of title; and Lord Westbury said: "It is said *Ignorantia juris haud excusat*, but in that maxim the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake."(*z*)

§ **771**. In Earl Beauchamp v. Winn, Lord Chelmsford, in addressing the house, said, "that the ignorance imputable to the party was of a matter of law arising upon the doubtful construction of a grant. This is very different from the ignorance of a well-known rule of law; and there are many cases to be found in which equity, upon a mere mistake of the law, without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such mistake.(*a*)

§ **772**. It seems to follow that, at least as a defense to specific performance, common error of law of both parties or even the sole error of the defendant, when resulting in mistake important to both parties to the contract as to some of the matters dealt with by the contract, would be sufficient. But it is submitted that neither the common error of both parties nor the sole error of the defendant as to the operation and effect of the contract can be a ground for resisting specific performance.(*b*)

§ **773**. Again, as in cases of hardship, the turning out of events in a way different from what the parties anticipated will not furnish a ground of defense; so in regard to mistake, if persons choose to speculate upon facts, and the view on which they acted proves to be a mistaken one, that

(*y*) 17 Ir. Ch. R., 73; L. R. 2 H. L. 149; supra, § 753.
(*z*) L. R. 2 H. L., 170.
(*a*) L. R. 6 H. L., 234. Cf. Heald v. Walls 18 W. R., 398.
(*b*) See supra, § 733 et seq.

circumstance will furnish no defense on which the court will act.(*c*)

§ **774**. Where there is a mistake of both parties, but not about the very subject of the contract, it will not be a ground for rectifying the contract. Therefore, where both parties were under a mistake as to the duration of a leasehold interest, so that the price was considerably less than if the actual extent of the interest had been known, and the vendors filed a bill asking for a reassignment of the extra term which the purchasers took under the assignment, Knight Bruce, V. C., held that the lease was the substance sold and not a term of the supposed duration, and that the vendors ought to have known what was the condition of the property they proposed to sell, and accordingly dismissed the bill.(*d*)[1]

§ **775**. In like manner the Roman jurists held that mistake as to the substance of the thing avoided the contract; but if there be only a difference in some quality or accident, though the misapprehension may have been the actuating motive, yet the contract remains binding.(*e*)

§ **776**. The court, on a clear principle, will not interfere for the rectification of a written contract where it was, by the intention of the parties to it, that the writing did not comprise all the terms of the actual contract; for what is done on purpose, is evidently not done by mistake. There-

(*c*) See, at common law, Harris v. Loyd, 5 M. & W., 432.
(*d*) Okill v. Whittaker, 1 De G. & Sm., 83, affirmed 2 Ph., 338.
(*e*) Kennedy v. Panama, etc., Mail Co., L. R. 2 Q. B., 580, and authorities there cited.

[1] The fact upon which the party claims relief, must be material to the act or contract—that is, it must be essential to its character, and an efficient cause of its inception. For if there be an accidental ignorance or mistake of a fact, yet, if the act or contract is not materially affected by it, the party claiming relief will be denied it. Therefore, where A. buys an estate of B., to which the latter is supposed to have an unquestionable title, and it turns out upon investigation of the facts, unknown at the time to both parties, that B. has no title, in such a case equity would relieve the purchaser and rescind the contract. But if A. were to sell an estate to B., whose location was well known to each, and they mutually believed it to contain twenty acres, and in point of fact it contained only nineteen acres and three-quarters, and the difference would not have varied the purchase in the view of either party, then the mistake would not furnish grounds for a rescission of the contract. And further, to entitle a party to relief, the fact must be such that he could not, with due diligence, have obtained accurate knowledge of it. And hence, if a person has lost his remedy at law, through negligence, equity will not assist him. Story's Eq. Jur., § 141; Willard's Eq. Jur., 70, 71; Trigg v. Reade, 5 Humph., 529; Perry v. Martin, 4 John.'s Ch., 566.

fore, where there was a contract for an annuity, and the parties to it designedly omitted a proviso for redemption, thinking it would render the transaction usurious, the court refused to rectify the deed.(*f*) The parties "desired the court," said Lord Eldon,(*g*) "not to do what they intended, for the insertion of that proviso was directly contrary to their intention, but they desired to be put in the same situation as if they had been better informed, and consequently had a contrary intention."(*h*)[1]

§ **777**. Where the parol variation which the plaintiff or defendant seeks to set up is a subsequent contract in parol between the parties to a written contract, the case in nowise comes within the doctrine of mistake, and the parol variation is inadmissible under the Statute of Frauds, except in cases where the refusal to perform it might amount to fraud.(*i*)[2]

§ **778**. Therefore where A., by writing, agreed with B. to grant him a lease, to commence on the 21st of April, B. being merely the agent of C.; and subsequently A. and C. agreed

(*f*) Lord Irnham v. Child, 1 Bro. C. C., 92; Lord Portmore v. Morris, 2 id., 219; Hare v. Shearwood, 3 id., 168; S. C., 1 Ves. Jun., 241.
(*g*) In Marquis Townshend v. Stangroom, 6 Ves., 332.
(*h*) See, also, Pitcairn v. Ogbourne, 2 Ves. Sen., 375; cf. Cripps v. Jee, 4 Bro. C. C., 472.
(*i*) See per Grant, M. R., in Price v. Dyer. 17 Ves., 364.

[1] The court will not interfere where the instrument itself is such as the parties intended it to be. If the parties voluntarily choose to express themselves in the language of the deed, they must be bound by it. Story's Eq. Jur., § 113; Willard's Eq. Jur., p. 69.

[2] Therefore, where A. contracted in writing to give B. a deed of land on the payment of B.'s notes for the purchase money, and afterwards agreed verbally to deliver a deed on demand, on the payment of B.'s notes before they were due, and at the time of this verbal agreement B. paid the notes then due, and afterwards tendered payment of the notes not then due, and A. refused to deliver the deed, it was held that performance of the contract, as modfied by this agreement, could not be enforced. Brooks v. Wheelock, 11 Pick., 489. But in such cases it is said that the variation may be available as a defense, if accompanied by such part performance as would enable the court to enforce it if it were an original, independent agreement, subject, nevertheless, to the doctrine of equity, which allows parties by their acts to vary the original agreement in respect of matters relating to the title and the time of completion. Will.'s Eq. Jur., p. 289.

Subsequent parol agreement to vary written contract.] "The written executed contract must be regarded as declaring the whole contract then made, and such promises, if receivable at all, are admitted merely as evidence tending to show the equity *dehors* the conveyance, arising from the misapprehension of the parties. It is exceedingly clear that such evidence is to be regarded with extreme caution. For otherwise the courts would, violate, in effect, the rule which they profess to hold sacred, that the operation of a deed or other written instrument shall not be abridged, enlarged or altered by parol testimony." Gaston, J., in Chamness v. Crutchfield, 2 Ired.'s Eq., 148; Price v. Dyer, 17 Ves., 356; Blanchard v. Moore, 4 J. J. Marsh., 471; Coger v. McGee, 2 Bibb., 321.

by parol that the lease should commence from the 24th of June instead of the 21st of April, and be made to C. instead of to B., and C. and B. sought a specific performance of the written contract as varied by the subsequent parol one, a plea of the Statute of Frauds was necessarily allowed.(*j*) And where there was a contract in writing, and the defendant set up a subsequent parol contract, by which the parties mutually abandoned the terms of the written contract and then agreed upen new terms, Grant, M. R., held that these new terms were merely meant to modify or add to the terms of the original contract; that therefore the parol contract could not be set up as a waiver of the first, and that the subsequent terms not having been in any way acted on, the second contract formed no defense to the first, the execution of which he accordingly directed.(*k*) Again, where the written contract was silent as to restrictive covenants, but there was some evidence of a subsequent contract to take the lease subject to a certain restrictive covenant as to trade, the Statute of Frauds was held to be a bar to the performance which the plaintiff sought of this subsequent parol contract.(*l*)

§ **779**. The question how far a plaintiff can enforce specific performance of a contract with a parol variation, or, in other words, with a rectification of a mistake, is on the authorities not perfectly clear; but the weight of authority appears distinctly to prevail in favor of the proposition that, under the practice of the court of chancery, a plaintiff could not sue for the specific performance of a contract with a parol variation.

Before proceeding to consider the cases on this point, we may briefly advert to principles.

§ **780**. With regard to a mistake of the plaintiff alone, it is at once obvious that to allow him to correct this mistake, and enforce the contract so corrected on the other party to it, would be a great injustice.

§ **781**. With regard, however, to a mistake of both parties to a contract in the reduction of the contract into writing, there can be no objection in point of justice to the plaintiff's asking to have that mistake corrected, and to

(*j*) Jordan v. Sawkins, 3 Bro. C. C., 388; S. C., 1 Ves. Jun., 402.

(*k*) Price v. Dyer, 17 Ves., 356.

(*l*) Snelling v. Thomas, L. R. 17 Eq., 303.

have the real contract carried into execution. This would be the result, if the plaintiff sued for specific performance of the written contract, and then submitted to a parol variation set up and proved by the defendant. Again, there being an undoubted jurisdiction for the reform of contracts, and also a jurisdiction for the execution of them, there seems no reason why, when both these grounds of action are necessary to give the plaintiff his full rights, they may not be proceeded on in one and the same action.

§ **782**. It may be said that a plaintiff seeking to correct and enforce a contract which is within the Statute of Frauds is suing in contravention of that act. But the objection seems untenable. For every action to correct by parol evidence a written contract, whether executed or executory, is in some sense a suing on the contract; yet the jurisdiction of equity in cases of mistake in written contracts is clear. Mistake, like fraud,(*m*) must be deemed an exception to the statute in equity.

§ **783**. Whether this reasoning be incorrect or not, there is a series of cases which seem to establish the proposition, that in the court of chancery a plaintiff could not be allowed to sue for the specific performance of a contract with a parol variation: these may now be considered.

§ **784**. In Rich v. Jackson,(*n*) the plaintiff sought the execution of a contract for a lease with a variation by the introduction of the words "clear of all taxes," and the witnesses proved the meaning of the parties to have been as the plaintiff alleged; but Lord Rosslyn said, "I cannot find that this court has ever taken upon itself, in executing a written agreement by a specific performance, to add to it by any circumstanse that parol evidence could introduce;"(*o*) and accordingly the parol evidence was rejected, and the court refused to execute the contract, except upon the terms of the written agreement, which the plaintiff declined, and according had his bill dismissed.

§ **785**. In Woollam v. Hearn,(*p*) the point was fully considered by Grant, M. R. The plaintiff alleged a contract with the defendant, by which the defendant was to grant to

(*m*) See supra, § 538.
(*n*) 4 Bro. C. C., 514; 6 Ves., 334 n.
(*o*) 6 Ves., 335 n.
(*p*) 7 Ves., 211; S. C., W. & T. Lead. Case., 484 (4th ed.), and cases there collected; Higginson v. Clowes, 15 Ves., 516, 523; Winch v. Winchester, 1 V. & B., 375, 378; Nurse v. Lord Seymour, 13 Beav., 254.

the plaintiff a lease of a certain house at £60 per annum: of this contract a memorandum was drawn up and signed, but by mistake, or with some unfair view, £73 10*s*. was inserted as the rent, instead of £60: by her bill the plaintiff sought specific performance of the contract rectified as to the amount of rent. The evidence of the plaintiff appeared to the judge to establish her position, but he rejected it and dismissed the bill, holding that though it would have been admissible for the plaintiff if she had been defendant, yet that it could not be used to procure a decree.

§ **786**. The same doctrine was entertained by Lord Redesdale,(*q*) and has on more than one occasion been stated by Lord Cottenham, and also by Wigram, V. C.(*r*) "It is," said Lord Cottenham in one case, "a familiar doctrine in this court, that although, to resist a specific performance, a defendant may show by parol that the written document does not represent the contract between the parties, yet a plaintiff cannot have a decree for a specific performance of a written contract with a variation upon parol evidence."(*s*)

§ **787**. In the case of the Attorney-General v. Sitwell,(*t*) Alderson, B., expressed a strong opinion, in accordance with the doctrine in question, that the court would not reform and then enforce an executory contract, except, perhaps, where the mistake was admitted by the answer, which might seem to take it out of the Statute of Frauds.

§ **788**. This line of cases may be closed by the authority of Lord St. Leonards. In a case which came before his lordship when chancellor of Ireland, there was a written contract for a lease, and then a lease executed in consequence of it, and a bill was brought for the reform of the lease, not by the contract, but by introducing a term into it by parol.(*u*) His lordship stopped the argument for the plaintiff, considering that it was really against first principles to discuss the point, and said that the deed could not be reformed by that which would have been inadmissible if the contract were resting *in fieri*, and the bill had sought a specific performance of it. "It is said," observed his lordship,(*v*) "that if a mistake was proved, and that there was

(*q*) Clinan v. Cooke, 1 Sch. & Lef., 22, 38.
(*r*) In Manser v. Back, 6 Ha., 447.
(*s*) In Squire v. Campbell, 1 My. & Cr., 480; London and Birmingham Railway Co. v. Winter, Cr & Ph, 57, 61. See, also, Emmett v. Dewhurst, 3 Mac. & G., 587.
(*t*) 1 Y. & C. Ex., 559.
(*u*) Davies v. Fitton, 2 Dr. & War., 225.
(*v*) 2 Dr. & War., 233.

no written agreement, the parol evidence would be admissible. Perhaps it might, because there is no settled rule of law in the way, and, as there is no written contract, the court must endeavor to ascertain, by the best evidence it can get, what was the contract of the parties, and whether there was any mistake."

§ **789**. It is, perhaps, not perfectly obvious why, if parol evidence would be admissible to correct a deed executed without any previous written contract, it should yet be inadmissible to correct a written contract itself; for the only principle applicable seems to be that writing excludes parol, and it might be thought that this would apply with more force to a solemn deed than to a mere preliminary contract.

§ **790**. It may, perhaps, also be inquired why, if the court presumes a previous contract resting in parol in the case of a deed, no such presumption is made in the case of a written contract; why the written contract may not, equally with the deed, be corrected by reference to such a previous parol contract; and why the court does not, as much in the one case as in the other, ascertain what that contract was by the best evidence it can get.

§ **791**. The current of authorities, however strong, can yet scarcely be considered uniform in favor of the position that the plaintiff can never avail himself of a parol variation. There are dicta of Lord Hardwicke's which, notwithstanding the remarks upon them of Lord Redesdale(*w*) and of Grant, M. R.,(*x*) imply, it is submitted, a somewhat different view of the question from that already stated.

§ **792**. In Walker v. Walker,(*y*) John Walker, a brother of both the plaintiff and defendant, contracted with the plaintiff, by parol, that if the plaintiff would surrender his copyhold estate for the benefit of the defendant, he, John Walker, would secure an annuity for the plaintiff's life, and another for that of his wife: upon this, John Walker surrendered his copyhold estate to the defendant, charged with these annuities; but the plaintiff did not, in accordance with his contract with John Walker, surrender his copyhold estate to the defendant, whereupon the defendant refused to pay the annuities. The plaintiff brought his bill

(*w*) In Clinan v. Cooke, 1 Sch. & Lef., 38.
(*x*) In Woollam v. Hearn, 7 Ves., 219.
(*y*) 2 Atk., 98; S. C., 6 Ves., 335 n.

for their payment, and the defendant relied on the plaintiff's breach of the parol contract with John Walker. Lord Hardwicke held that the plaintiff's equity was rebutted by the defendant's equity, and added,(z) "I am not at all clear whether, if the defendant had brought his cross-bill to have this agreement established, the court would not have done it, upon considering this in the light of those cases, where one part of the agreement being performed by one side, it is but common justice it be carried into execution on the other, and the defendant would have had the benefit of it as an agreement." And in Joynes v. Statham,(a) Lord Hardwicke expressed his opinion that evidence of the omission, in a contract for a lease, of the expression "clear of taxes," might have been given by the defendant, if he had been plaintiff seeking a specific performance, but his lordship considered it in the light of an explanation of an executory contract, and not of a variation.

§ **793**. There was a case before Lord Thurlow which, though it rests rather on the ground of fraud than mistake, comes very near to admitting parol evidence on the part of the plaintiff to supply a term in a written contract. It was a bill brought by the original lessees of a term against the purchaser from them, for the specific performance of a contract to indemnify the plaintiffs against all rents and covenants in the lease, and to execute a bond for securing such indemnity. The property had been sold by auction, and the conditions of sale did not stipulate for such an indemnity; but the contract was proved by parol. Lord Thurlow held the evidence to be admissible, and laid it down that where an objection is taken before the party executes the contract, and the other side promise to rectify it, it is to be considered a fraud on the party, if such promise is not kept; and his lordship, after an issue to satisfy himself of the facts, granted specific performance.(b)

§ **794**. Lord Eldon seems to have been of opinion that parol evidence was admissible for the plaintiff. In the Marquis Townshend v. Stangroom,(c) the plaintiff in the original bill sought specific performance with a parol variation,

(z) 2 Atk., 100.
(a) 3 Atk., 388 See this and the preceding case observed on by Lord Redesdale in Clinan v. Cooke, 1 Sch. & Lef., 38, 39.
(b) Pember v. Mathers, 1 Bro C. C., 52; per Grant, M R, in Clarke v. Grant, 14 Ves., 524; See. also, Harrison v. Gardner, 2 Mad., 198.
(c) 6 Ves., 328.

and the defendant by a cross bill sought the performance of the written contract as it stood. "I will not say," said his lordship, "that upon the evidence without the answer I should not have had so much doubt, whether I ought not to rectify the agreement upon which Stangroom relies, as to take more time to consider, whether the bill should be dismissed,(*d*) language which seems to imply that, had the evidence been satisfactory, the contract might have been rectified and performed.

§ **795**. In a case before Knight Bruce, V. C., there was an assignment by deed of a farming lease and stock for a valuable consideration stated in the deed, and it was proved by parol that, over and above this consideration, there was a contract to pay the plaintiff £40 a year for his life, and to find him during the same period a house worth £10 a year; the assignment having been carried into effect, the court granted specific performance of the parol contract at the suit of the annuitant:(*e*) the case was put on the ground of an additional consideration, which may be proved by parol when not inconsistent with the instrument.(*f*) It may be observed that, where such a consideration is executory and is alleged by the plaintiff, and a specific performance of it obtained, the case seems to afford one instance in which a plaintiff may obtain specific performance of a contract with a parol variation.

§ **796**. In the case of Martin v. Pycroft,(*g*) the plaintiff alleged a written contract for a lease, and in addition a parol term—namely, that he was to pay the defendant £200 for it —and prayed specific performance: Parker, V. C., refused it on the ground that the plaintiff himself showed that a material term in the contract had been omitted, and that the specific performance of such a contract was inconsistent with the Statute of Frauds. This decision was overruled by the lords justices, who held a written contract to be, in the absence of fraud or mistake, binding at law and in equity according to its terms, although verbally a term was

(*d*) 6 Ves., 339.

(*e*) Clifford v. Turrell, 1 Y. & C. C. C., 138; c.. Keenan v. Handley, 12 W. R., 932 (where a contract to grant an annuity in consideration of discontinuance of cohabitation was enforced).

(*f*) Rex v. Scammonden, 3 T. R., 474.

(*g*) 2 De G. M. & G., 785. In the case of Robinson v. Page, 3 Russ., 114, the parol variations to which the plaintiff by his bill offered to submit were considered by the court not to affect the plaintiff's rights: the defendant was allowed to elect whether they should be carried into effect or not, by reason of the plaintiff's offer, and not of any original right in the defendant.

agreed to which has not been inserted in the document, subject to this, that the defendant may call on the court to be neutral, unless the plaintiff will consent to the omitted term, and that the case under consideration came within that rule. The term was here, however, set up not by the defendant, but by the plaintiff, and the case seems, therefore, to show that the plaintiff may allege a parol variation, which, if set up by the defendant and submitted to by the plaintiff, might have been introduced into the contract as specifically performed by the court. It thus seems to establish a very important limitation on the generality of the rule, that a plaintiff can never allege such a variation.

§ **797**. In this state of the authorities, it may be interesting to state the opinion of American jurists. Though the doctrine that the plaintiff can never adduce parol evidence of a variation in suits for specific performance has been acted on by some of the courts of that country,(*h*) it has been combated by some of its most eminent jurists. "It is in effect," says Mr. Justice Story, "a declaration that parol evidence shall be admissible to correct a writing as *against* a plaintiff, but not *in favor* of a plaintiff seeking a specific performance. There is, therefore, no mutuality or equality in the operation of the doctrine. The ground is very clear, that a court of equity ought not to enforce a contract where there is a mistake, against the defendant insisting upon and establishing the mistake; for it would be inequitable and unconscientious. And if the mistake is vital to the contract, there is a like clear ground why equity should interfere at the instance of the party as plaintiff, and cancel it; and if the mistake is partial only, why, at his instance, it should reform it. In these cases the remedial justice is equal; and the parol evidence to establish it is equally open to both parties to use as proof. Why should not the party aggrieved by a mistake in an agreement have relief in all cases, where he is plaintiff, as well as where he is defendant? Why should not parol evidence be equally admissible to establish a mistake as the foundation of relief in each case? The rules of evidence ought certainly to work equally for the benefit of each party."(*i*)

(*h*) 1 Story, Eq. Jur., § 161. (*i*) Story, Eq. Jur., § 161 n.

§ **798**. In delivering judgment in the case of Keisselbrack v. Livingstone,(*j*) Mr. Chancellor Kent held the following language: "Why should not the party aggrieved by a mistake in the agreement have relief as well when he is plaintiff as when he is defendant? It cannot make any difference in the reasonableness and justice of the remedy, whether the mistake were to the prejudice of the one party or the other. If the court be a competent jurisdiction to correct such mistakes (and that is a point understood and settled), the agreement, when corrected and made to speak the real sense of the parties, ought to be enforced, as well as any other agreement perfect in the first instance. It ought to have the same efficacy and be entitled to the same protection, when made accurate under the decree of the court *as when made accurate by the act of the parties.*"(*k*)[1]

§ **799**. The judicature act, 1873 (§ 24, subsection 7), requires the high court in any cause to grant all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal and equitable claim properly brought forward by them respectively in such cause, so that so far as possible all matters in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided. It is submitted that under this provision the high court could have no difficulty in entertaining an action for the reforma-

(*j*) 4 John.'s Ch. Rep., 148.

(*k*) See per Lord Eldon in Cook v. Richards, 10 Ves., 441.

[1] It has become an established rule in this country, that the plaintiff is as fully entitled, in cases of this kind, to equitable relief, upon an agreement so varied by parol, as the defendant. Equity will therefore correct an agreement according to its true intent, when the variation is clearly established by evidence *aliunde*, and enforce it as corrected. Rogers v. Atkinson, 1 Kelly, 12; Coot v. Craig, 2 Hen. & Munf., 618; Rhode Island v. Massachusetts, 15 Pet., 233. Gillespie v. Moon, 2 John.'s Ch., 585; Smith v. Allen, Saxton, 43; Dismukes v. Terry, Walker, 197; Hendrickson v. Jones, Saxton, 562; Chamberlain v. Thompson, 10 Conn., 243; Cobb v. Preston, 2 Root, 78. Sandford v. Washburn, id., 449; Elmore v. Austin, id., 415; Wilson v. Henderson, 4 Scam., 13. Shelly v. Smith, 2 A. K. Marsh., 504; Gooding v. McAllister, 9 How.'s Pr. Rep, 123. Therefore, where two tenants in common agreed to make partition, according to the award of referees, executed deeds, and took possession under them, and it subsequently appeared that, in the plaintiff's deed, a tract which had been assigned to him, had been omitted by mistake, it was held that the mistake should be rectified, and that a specific performance of the contract, as to the tract omitted, should be decreed. Tilton v. Tilton, 9 N. H., 385. And see Coles v. Brown, 10 Paige, 535, a case decided by Walworth, chancellor. See, also, Rosevelt v. Fulton, 2 Cow., 129.

tion of a contract, and for the specific performance of such reformed contract, in every case in which the Statute of Frauds did not create a bar.

§ **800**. It may be added that there are cases somewhat resembling specific performance, where, in the same suit, the plaintiff has had an instrument rectified, and then obtained consequential relief; as where a bond and deposit of deeds were given to secure an advance, and the bond, by mistake, appeared to be usurious; the plaintiff proved the mistake, had the bond rectified, and was held entitled to the consequential relief to which an ordinary obligee and equitable mortgagee is entitled.(*l*) In another case a client entered into a contract with his solicitor for the payment of a fixed sum of money in lieu of costs, and the contract contained mistakes as to the name and rights of the client, which, if construed strictly, would have excluded the solicitor from all rights under the contract. In consequence of these mistakes, the solicitor, by his bill, alleged that he had no remedy at law, and accordingly prayed that the contract might be rectified, and an order made for payment of the sum of money under the contract, as if, at the time of its execution, it had expressed the intention of the parties: the court made a decree directing the payment of the money.(*m*)

§ **801**. It may here be added that a misdescription in the contract may be attributable to (1) the plaintiff alone, or (2) the defendant alone, or (3) both parties; and in either of the former cases it may be either fraudulent or innocent. If it be fraudulent, the party guilty of the fraud of course cannot avail himself of it in any way: if it be innocent, then (1) if it be attributable to the plaintiff alone and induce mistake, if falls under the head of mistake induced by the plaintiff;(*n*) (2) if it be attributable to the defendant alone, it comes under the head of mistake purely due to the defendant;(*o*) and lastly (3) if it be attributable to both parties, it falls under the head of common error or mistake.[1]

(*l*) Hodgkinson v. Wyatt, 9 Beav., 566.
(*m*) Stedman v. Collett, 17 Beav., 608.
(*n*) Supra, § 726 et seq., § 780.
(*o*) Supra, § 728 et seq.
(*p*) Supra, § 749 et seq; § 781.

[1] *Contemporaneous writings in cases of mistake in written contract.*] Where it is sought to vary a written contract by parol proof, the court will take into consideration acts done under the agreement, and also examine contemporaneous

writings between the parties if they were written within a reasonable time, and relate to the same subject matter. Winnipissesgee Manuf. Co. v. Perley, 46 N. H., 83.

Waiver of written contract by parol proof.] Parol evidence may be introduced to show that an executory contract, which has been reduced to writing, but not under seal, has been discharged, abandoned or waived. But where the agreement to rescind is established by parol proof only, the evidence must be very clear of the intention to change the written contract. Laner v. Lee, 42 Pa. St., 165; Buel v. Miller, 4 N. H., 196; Goucher v. Martin, 9 Watts, 106; Bottsford v. Buer, 2 John.'s Ch., 405; Buckhouse v. Crosby, 2 Eq. Cas. Ab., 32; Boyce v. McCullock, 3 Watts & Serg., 429; Tolson v. Tolson, 10 Mo., 736; Bowser v. Cravener, 56 Pa. St., 132.

Mistake in award; correction.] Where there is clearly a mistake in an award, a court of equity will correct it. Kerr on Fraud and Mis., 446, 448; Bunpass v. Webb, 4 Porter, 65; Wheatly v. Wartin, 6 Leigh., 62; Ryan v. Blunt, 1 Dev. Eq., 382; Pleasant v. Ross, 1 Wash. (Va.), 156. An error in judgment on the merits will not be corrected however. Head v. Muir, 3 Rand , 122; Van Courtland v. Underhill, 17 John., 405; Cromwell v. Owings, 6 Har. & John., 10; Radcliffe v. Wightman, 1 McCord's Ch., 408; Rudd v. Jones, 4 Dana, 229; Hurst v. Hurst, 2 Wash. C. C., 127; Burchell v. Marsh, 17 How., 344; Boston Water Power Co. v. Gray, 6 Met., 131.

Settlement of controversies; mistake as to the law.] Where a compromise is entered into to avoid or terminate a litigation, both parties having the same means of knowledge, and there is neither fraud, misrepresentation or undue influence practiced—held, that a mistake as to the law is no reason for setting aside such compromise. The rule is the same where, in fact, only one of the parties has a valid claim, if the parties themselves considered it doubtful. Gordon v. Gordon, 3 Swanst., 463; Lawton v. Campion, 18 Beav., 87; Stewart v. Stewart, 6 Cl. & Fin., 969; Brooke v. Lord Morton, 2 De G. J. & S., 373; Stapleton v. Stapleton, 1 Atk., 2; Luck, *ex parte*, 4 De G. M. & G., 356; Wheeler v. Smith, 9 How., 55. But the rule is reversed in a case where a party, having no knowledge of a well-settled principle of law, is imposed upon, and made to surrender his property under the pretense that a compromise will be affected. Naylor v. Winch, 1 Sim. & Ster., 555; Jones v. Munroe, 32 Ga., 181.

Mistake which has reference to both the law and the facts.] In such a case, equity will afford relief, as it forms an exception to the rule. A party reposing confidence in his counsel gave his note for more than he was legally bound to pay; this was done through a mistake of the counsel. Held, that equity would relieve him. Fitzgerald v. Peck, 4 Litt., 125; Gross v. Leber, 47 Pa. St., 520.

Mistake as to matters of fact.] In such case, party complaining must not be in fault, and must be reasonably diligent. Leake on Contracts, 182; Jenks v. Fritz, 7 Watts & Serg., 201; Ketchum v. Catlin, 21 Vt., 191; Duke of Beaufort v. Neeld, 12 Cl. & Fin., 248, 286; Merchants' B'k v. McIntyre, 2 Sandf., 431; Wild v. Hillis, 18 L. J. Ch., 170; Jouzin v. Foulmin, 9 Ala., 662; Warner v. Daniels, 1 Woodb. & Minot, 90; Western R. R. Co. v. Babcock, 6 Metc., 346; Copehart v. Moon, 3 Jones' Eq., 178; Lenty v. Hillas, 2 De G. & J., 110; Laub v. Harris, 8 Ga., 546; Daniel v. Mitchell, 1 Story, 172; Ferson v. Sanger, 1 Woodb. & Minot, 138; Hill v. Bush, 19 Ark., 522; Dimon v. Providence R. R. Co., 5 R. I., 130; Taylor v. Fleet, 4 Barb., 95; Penny v. Martin, 4 John.'s Ch., 566; Kite v. Lunpkin, 40 Ga., 506; Custard v. Custard, 25 Tex., 49; Wood v. Patterson, 4 Md.'s Ch., 335; Peterson v. Grover, 20 Me., 363; Upham v. Hamill, 11 R. I., 565.

Equity will reform a contract in order that it shall express the real intent of the parties.] When the phraseology of the contract does not express the true intention of the parties, specific performance will be refused; a court of equity will carry out the real intention of the parties. James v. State Bank, 17 Ala., 69; Mitchel v. Nicholson, 8 Yerg., 194; Quick v. Stuyvesant, 2 Paige's Ch., 84; Mechanics' Bank v. Lynn, 1 Pet., 376; King v. Hamilton, 4 id., 311; Bradbury v. White, 4 Me., 391; Clopton v. Martin, 11 Ala., 187; Frisby v. Ballance, 5 Ill. (4 Scam.), 287; Dulamy v. Rogers 50 Md., 524; Hunt v. Freeman, 1 Ohio, 490; Langdon v. Keith, 9 Vt., 299; Fairstone v. De Camp, 2 C. E. Green,

317; Webster v. Harris, 16 Ohio, 490; Rings v. Ashworth, 3 Iowa, 452; Mosely v. Wall, 23 Miss., 31; Leavitt v. Palmer, 3 N. Y., 19; McElderry v. Shirley, 2 Md., 25; Cummings v. Steele, 54 Miss., 647; Smith v. Jordan, 13 Minn., 264.

Mistake as to the subject matter of the contract.] In a case where, at the time the agreement is entered into, there is a mutual mistake in relation to the subject matter, such contract will not be enforced in equity. Either party may apply to have it rescinded. Daniel v. Mitchell, 1 Story, 173; Ledger v. Bonnaffe, 2 Barb., 475; Snell v. Mitchell, 65 Me., 48; Miles v. Stevens, 3 Pa. St., 21; Quick v. Fulton, 3 Gratt., 193; Pitcher v. Hennesy, 48 N. Y., 415. Lord Thurlow says in Calverly v. Williams, 1 Ves., 210: "No doubt if one party thought he has purchased *bona fide*, and the other party thought he has not sold, that is a ground to set aside the contract that neither party may be damaged. Because it is impossible to say, one shall be forced to give that price for part only, which he intended to give for the whole; or that the other shall be obliged to sell the whole for what he intended to be the price of part only." See, also, Hitchcock v. Giddins, 4 Price, 135.

Mistake in reducing agreement to writing.] Where the contract is correctly understood by both parties, but in reducing it to writing an error is made, such writing will, in an equitable action, be made to conform to the true agreement; it will not be rescinded. Wake v. Hanoff, 1 H. & C., 202; Barrow v. Barrow, 18 Beav., 519; Scofield v. Lockwood, 32 id., 436; Desell v. Casey, 3 Dessau.'s Eq., 84; Leonard v. Austin, 2 How. (Miss.), 888; Ashurst v. Mill, 7 Hare, 502; Druiff v. Parker, L. R., 5 Eq., 137; Murray v. Parker, 16 Beav., 308; Malmsbury v. Malmsbury, 31 id., 407; Reade v. Armstrong, 7 Ired.'s Ch., 375; Washburn v. Menell, 1 Day, 139; McMillen v. McMillen, 7 Mon., 560; Keyton v. Bradford, 5 Leigh, 38; Brown v. Bonner, 8 id., 1; Finley v. Lyon, 6 Cranch, 238; Scott v. Duncan, 1 Dev.'s Eq., 403; Goodsell v. Field, 15 Vt., 448; Larkins v. Biddle, 2 Ala., 252; Newcomer v. Kline, 11 Gill. & Johns., 457; Collier v. Lanier, 1 Kelly, 238; Alexander v. Newton, 2 Gratt., 206; Stedwell v. Anderson, 21 Conn., 139; Manz v. Beckman Iron Co., 9 Paige's Ch., 188; Clump's App., 65 Pa. St., 476; Pickett v. Merchants' Nat. B'k, 32 Ark., 346. In Rogers v. Odel, 36 Mich., 411, Campbell, J., said: "It requires very strong equities to induce a court to refuse to enforce a written contract, even where a mistake is alleged to have been made in drawing it up." It is not enough that one of the parties to an agreement misunderstood its terms; the difference between the real agreement and the written contract must be understood; in other words, where a party seeks to reform a written instrument, he must show that a material stipulation was inserted or omitted contrary to the material intention of both parties. Nevins v. Dunlap, 33 N. Y., 676; Lyman v. Ins. Co., 17 Johns., 373; Lanair v. Wyman, 3 Rob., 147; Wemple v. Stewart, 22 Barb., 154; Pennell v. Wilson, 2 Abb. Pr. (N. S.), 466; Cooper v. Mutual Fire Ins. Co., 50 Pa. St., 299; Point St. Iron Works v. Simmons, 11 R. I., 406.

Mistake of the scrivener.] Sharswood, J., said, in Huss v. Morris, 63 Pa. St., 367: "It is the well settled-rule in this State, that the mistake of a scrivener in preparing a deed or other writing, may be shown by parol evidence, and the instrument reformed accordingly. It is but the exercise of the equity powers in all our courts from the earliest days of the province." See, also, Wintermute v. Snyder, 2 Green's Ch., 489; Wooden v. Haviland, 18 Conn., 101; Collin v. Lanier, 1 Kelley, 238; McCann v. Letcher, 8 B. Mon., 320; Elmore v. Austin, 2 Root, 415; Cook v. Preston, 2 Root, 78; Chapman v. Allen, Kerby, 399; Gower v. Sterner, 2 Whart., 75; Rogers v. Atkinson, 1 Kelly, 12; Chew v. Gillespie, 56 Pa. St., 308; Wycke v. Green, 16 Ga., 49; Cooke v. Husbands, 11 Md., 492; McDonald v. Starkie, 42 Ill., 442; Murphy v. Raney, 45 Cal., 78; Pugh v. Chesseldine, 11 Ohio, 109. The New York Court of Appeals said, in De Peyster v. Hasbrouck, 1 Kernan, 582: "It is unnecessary to refer to cases to establish the familiar doctrine that where, through mistake or fraud, a contract or conveyance fails to express the actual agreement of the parties, it will be reformed by a court of equity so as to correspond with the actual agreement."

Slight parol proof of mistake will not be sufficient to enable a party to evade his written contract; in such a case, great attention will be paid to what is stated by the other party to the instrument. Andrews v. Essex Ins., 3 Mason, 6; Kerr on Fraud and Mis., 416; Philpott v. Elliott, 4 Md. Ch., 273; Bailey v.

Bailey, 8 Humph., 230; Harrington v. Harrington, 2 How. (Miss.), 721; Hall v. Claggett, 2 Md.'s Ch., 51; Perry v. Pierson, 1 Humph., 431; Adams v. Robertson, 37 Ill., 45; Durant v. Bacot, 15 N. J. Eq., 411.

Rule in the United States.] It may now be said to be the well-settled rule in this country that, in a case where a party plaintiff would be entitled to maintain an action that a written agreement be reformed, he could introduce parol evidence of mistake on a bill for specific performance. Keisselbrack v. Livingston, 4 John.'s Ch., 144; Philpott v. Elliott, 4 Md. Ch., 273; Coles v. Brown, 10 Paige's Ch., 535; Lyman v. United Ins. Co., 17 John., 377; Gouverneur v. Titus, 1 Edw. Ch., 477; Bellows v. Stone, 14 N. H., 175; Beardsley v. Knight, 10 Vt., 185; Wooden v. Haviland, 18 Conn., 101; White v. Port Huron R. R. Co., 13 Mich., 356. In some of the States, however, the rule is modified with the qualification that in cases where the contract is within the Statute of Frauds, while parol evidence is admissible on the part of the plaintiff to restrict or even modify a written instrument, yet it cannot be received to enlarge or extend its powers. Glass v. Hulbert, 102 Mass., 24; Thomas v. McCormick, 9 Dana, 108; Elder v. Elder, 10 Me., 80; Whittier v. Van Schaick, 5 Oregon, 113; Osborn v. Phelps, 19 Conn., 62.

Rule as to relief from mistake whether party plaintiff or defendant] Kent, Ch., says, in Keisselbrack v. Livingston, 4 John.'s Ch., 144: "Why could not the party aggrieved by a mistake in an agreement, have relief as well when he is a plaintiff as when he is defendant? It cannot make any difference in the reasonableness or justice of the remedy, whether the mistake were to the prejudice of one party or the other. If the court be a competent jurisdiction to correct such a mistake (and that is a point understood and settled), the agreement when corrected and made to speak the real sense of the parties, ought to be enforced as well as any other agreement perfect in the first instance. It ought to have the same efficacy, and be entitled to the same protection when made accurate under the decree of the court, as when made accurate by the act of the parties." On this subject the following language is used in Story's Eq Jur., § 161 (note): "It is, in effect, a declaration that parol evidence shall be admissible to correct a writing as against a plaintiff, but not in favor of a plaintiff seeking specific performance. There is, therefore, no mutuality or equality in the operation of the doctrine. The ground is very clear that a court of equity ought not to enforce a contract, where there is a mistake, against the defendant insisting upon and establishing, for it would be inequitable and unconscientious. And if the mistake is vital to the contract, there is a like clear ground why equity should interfere at the instance of the party as plaintiff, and cancel it; and if the mistake is partial only, why, at his instance, it should reform it. In these cases, the remedial justice is equal; and the parol evidence to establish it is equally open to both parties to use as proof. Why should not the party aggrieved by a mistake in an agreement, have relief in all cases, where he is plaintiff as well as where he is defendant? Why should not parol evidence be equally admissible to establish mistake as the foundation of relief in each case? The rules ought certainly to work equally for the benefit of each party. It may be added that if the doctrine be founded upon the impropriety of admitting parol evidence to contradict a written agreement, that rule is not more broken in upon by the admission of it for the plaintiff, than it is by the admission of it for the defendant. If the doctrine had been confined to cases arising under the Statute of Frauds, it would, if not more intelligible, at least have been less inconvenient in practice. But it does not appear to have been thus restricted, although the cases in which it has been principally relied on, have been of that description. It will often be quite as unconscientious for a defendant to shelter himself under a defense of this sort, against a plaintiff seeking the specific performance of a contract and the correction of a mistake, as it will be to enforce a contract against a defendant which embodies a mistake to his prejudice."

CHAPTER XVI.

OF THE INCAPACITY OF THE COURT TO PERFORM PART OF THE CONTRACT.

§ **802**. The court will not, as a general rule, compel specific performance of a contract, unless it can execute the whole contract; or, as Lord Romilly, M. R., expressed it: "This court cannot specifically perform the contract piecemeal, but it must be performed in its entirety if performed at all."(*a*) It often, therefore, becomes important to inquire whether a contract is entire or divisible, or, in other words, what is the whole contract which must be executed; and it is proposed in the present chapter, first, to inquire what contracts are divisible: secondly, to illustrate the general doctrine of the court above stated; and, thirdly, to consider the exceptions or apparent exceptions to the rule.

§ **803**. It is obvious that the decision of the question whether a contract is entire or divisible, must depend on the particular nature of each contract, and the terms in which it is concluded: but some general rules may be gathered from the cases.

§ **804**. A contract for the sale of property in one lot will generally be considered indivisible. Thus, in a case where two undivided seventh shares of land were sold in one lot, the court refused to enforce specific performance where a good title could be made to one-seventh only:(*b*) and the purchaser of the entirety will, of course, not be compelled to take six undivided seventh parts of the estate.(*c*) And so in a case, where two persons were owners of an estate in undivided moieties, and the plaintiff sought to enforce an alleged contract by them to lease the coals under it, but could not prove any such contract against one of the owners, one ground on which the bill was dismissed against the other owner also was that he had never contracted to lease

(*a*) Merchants' Trading Co. v. Banner, L. R. 12 Eq., 23; cf. per Turner, L. J., in Kernot v. Potter, 3 De G. F. & J., 459.

(*b*) Roffey v. Shatcross, 2 Bro. C. C., 118 n.; S. C. (same note), Roffey v. Shollcross, 4 Mad., 227.

(*c*) Dalby v. Pullen, 3 Sim., 29.

one share alone. If he had held himself out and contracted as the owner of the whole, then the case would have been different.(*d*)[1]

§ **805**. But where properties are of two descriptions—as, for example, a ship and the freight—the fact that they are both included in one instrument, and dealt with for one entire sum, does not seem conclusively to render the contract indivisible.(*e*)[2]

(*d*) Price v. Griffith, 1 De G. M. & G., 80, 85. (*e*) Mestaer v. Gillespie, 11 Ves., 621, 629.

[1] Thus a contract for the sale of land, "bounded as expressed in the survey made by C. K., and estimated by the said C. K. at 1,022¾ acres," for which the vendee was to pay $25,568.75, which was just twenty-five dollars per acre for that quantity, was held to have been a sale in gross. But articles of agreement for the sale of a tract of land, both parties believing it to contain 100 acres, for $2,000, will be considered as importing a sale by the acre, where it appears that the vendee refused to take it without a survey. In this case the vendor acquiesced in the survey, and an excess of acres having been found, the vendee was held liable for such excess at the rate of twenty dollars per acre. Clark v. Baker, 5 Metc., 452, a case decided at law by Hubbard, J., furnishes an excellent illustration of the entirety of contracts generally. There A. purchased of B. a cargo of white and yellow corn, on board of B.'s schooner, the quantity not being known, and agreed to pay one sum per bushel for the yellow, and another sum per bushel for the white, B. warranting it to be of certain quality. A. paid B. $1,200 "on account of corn per schooner." The schooner was hauled to A.'s wharf, and he took therefrom and put into his warehouse a part of the corn, and then refused to receive any more, because the residue was not such as B. had warranted it to be, and immediately gave notice to B. that he would receive no more of the cargo, and requested B. to take the schooner away. The corn thus taken by A. amounted, at the agreed price per bushel, to $1,067, and A. sued B. in an action for money had and received, to recover back the difference between that sum and the $1,200. Held, that the contract was entire, and that the action could not be maintained: that A. might have rescinded the contract by returning all the corn, and then have maintained an action to recover back the money advanced, or might have retained an action on the warranty. "Was there one bargain for the whole cargo," says Hubbard, J., "or was there two distinct contracts for the yellow and white corn, or was there a separate and independent bargain for each bushel of corn contracted for, in consequence of which the receipt of one or more bushels of the warranted quality, imposed no duty upon the plaintiff to retain the residue? And we are of opinion that the contract was an entire one. The bargain was not for 2,000 or 3,000 bushels of corn, but it was for the cargo of the schooner Shylock, be the quantity more or less—a cargo known to consist of two different kinds of corn: and the means taken to ascertain the amount to be paid were in the usual mode, by agreeing on the rate per bushel. * * * There is no ground on the evidence as reported, to maintain that there were two contracts for the distinct kinds of corn: for it does not appear but that the 1,405 bushels that were retained, consisted of a part of each. So that the plaintiff, to support his position, must contend, as he has contended, that the bargains in this case were separate bargains for each several bushel of a given quality, and for a distinct price. But this separation into parts so minute of a contract of this nature, can never be admitted; for it might lead to the multiplication of suits indefinitely, in giving a distinct right of action for every distinct portion. As well might a man who sold a chest of tea by the pound, or a piece of cloth by the yard, or a piece of land by the foot or acre, contend that each pound, yard, foot or acre was the subject of a distinct contract, and each the subject of a separate action.

[2] But, as a general rule, if the consideration to be paid is single and entire,

§ **806**. After some vacillation in the older cases,(*f*) it has been decided at common law, that where property is sold in distinct lots, there is a separate contract for each lot,(*g*) each buyer having a complete right of action after he is declared the purchaser of each lot.(*h*) And in equity the same is *prima facie* the case, so that, in the absence of special circumstances, a vendor is entitled to compel the purchaser of two lots to complete his purchase of the one, though he may fail in making out a title to the other.(*i*)[1] But where,

(*f*) See the cases reviewed by Lord Brougham in Casamajor v. Strode, 2 My. & K., 724; Chambers v. Griffiths, 1 Esp., 150, seems to be overruled.

(*g*) James v. Shore, 1 Stark., 426; Roots v. Lord Dormer, 4 B. & Ad., 77; per Coleridge, J., in Seaton v. Booth, 4 A. & E., 536.

(*h*) Emmerson v. Heelis, 2 Taunt., 38, 45.

(*i*) Lewin v. Guest, 1 Russ., 325. See, also, Buckmaster v. Harrop, 7 Ves., 341; S. C., 13 id., 456.

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the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items. Pars. Contr., vol. 1, pt. 2, ch. 1, p. 31. Therefore in Miner v. Bradley, 22 Pick., 457, where the defendant put up at auction a certain cow and 400 lbs. of hay, both of which the plaintiff bid off for $17, which he paid at the time. He then received the cow, and afterwards demanded the hay, which was refused by the defendant, who had used it. This action was brought to recover back the value of the hay. The defendant objected that the contract was entire; that the plaintiff could not recover back the price paid, or any portion of it, without rescinding the whole contract, and that this could not be done without returning the cow. And this objection was sustained by the court.

[1] So in the case of Miner v. Bradley, cited above, Morton, J., said: There may be cases, where a legal contract of sale, covering several articles, may be severed, so that the purchaser may hold some of the articles purchased, and, not receiving others, may recover back the price paid for them. Where a number of articles are bought at the same time, and a separate price agreed upon for each, although they are all included in one instrument of conveyance, yet the contract, for a sufficient cause, may be rescinded as to part, and the price paid recovered back, and may be enforced as to the residue. But this cannot properly be said to be an exception to the rule, because, in effect, there is a separate contract for each separate article. This subject is well explained, and the law well stated, in Johnson v. Johnson, 3 B. & P., 162. Johnson v. Johnson is this: In that case the plaintiff had purchased, from the same persons, two parcels of real estate, the one for £700, the other for £300, and had taken one conveyance for both. After having paid the purchase money, and taken possession, he was evicted from the smaller parcel, in consequence of a defect in the title derived under the purchase, and thereupon brought an action for money had and received to recover back the £300, at the same time refusing to give up the parcel of land for which £700 had been paid. And the court held that he was entitled to recover. Lord Alvanley, in delivering the judgment of the court, said: "My difficulty has been, how far the agreement is to be considered as one contract for the purchase of both sets of premises, and how far the party can recover so much as he has paid by way of consideration for the part of which the title has failed, and retain the other part of the bargain. This, for a time, occasioned doubt in my mind; for, if the latter question were involved in this case, it would be a question for a court of equity. If the question were how far the particular part of which the title has failed, formed an essential ingredient of the bargain, the grossest injustice would ensue if a party were suffered, in a court of law, to say he would retain all of which the title was good, and recover a proportionate part of the purchase money for the rest. Possibly the part which he retained might not have been sold, unless the other part had been taken at the same time; and ought not to be valued in proportion to its extent, but according to the various circumstances connected with it. But

from the nature of the contract, or the property that is the subject of it, or upon matters known to both parties, one of them can prove that the one transaction was dependent on the other, the two form one contract, although there may be no express statement to that effect.(*j*) And the parties by their subsequent dealing may convert two or more distinct contracts into an entire one, as by entering into one contract for the sale of the several subject matters at one aggregate price.(*k*) Thus where A. purchased by auction three lots of

(*j*) Casamajor v. Strode, 2 My. & K., 722; Poole v. Shergold, 2 Bro. C. C., 118; S. C., 1 Cox, 273; and at common law, Gibson v. Spurrier, Peake, Add. C., 49.

(*k*) Dykes v. Blake, 4 Bing. (N. C.), 463.

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a court of equity may inquire into all the circumstances, and may ascertain how far one part of the bargain formed a material ground for the rest, and may award a compensation according to the real state of the transaction. In this case, however, no such question arises; for it appears to me that, although both pieces of ground were bargained for at the same time, we must consider the bargain as consisting of two distinct contracts; and that the one part was sold for £300, and the other for £700." Morton, J., then continued: "Had the plaintiff bid off the cow at one price, and the hay at another, although he had taken one bill of sale for both, it would have come within the principles of the above case." Another case in point is Robinson v. Green, 3 Metc., 159. That was an action of assumpsit to recover compensation for services rendered by the plaintiff to the defendant as an auctioneer, in selling seventy-six lots of wood. The plaintiff was a licensed auctioneer for the county of Middlesex. Two of the lots of wood sold were in the county of Middlesex, and the rest were in the county of Suffolk. The defendant contended that the claim of the plaintiff was entire; that part of it was a claim for services which were illegal, in selling property out of his county; and that the contract being entire, and the consideration, as to part, at least, illegal, the action could not be maintained. But Chief Justice Shaw decided to the contrary, upon the grounds that plaintiff's claim for compensation arose upon each several sale, and was complete upon the conclusion of every such sale. That there was express promise to pay him a fixed sum upon the termination of the entire sale of all the lots; and, therefore, part of the consideration being illegal, it did not avoid the whole contract. See Pars. Contr., vol. 2, p. 30. But where a contract for the sale and delivery of property consists of several agreements, independent of each other, and the vendor fulfills the agreement to be the first performed, but violates all the others. Quære, can he, after he has violated all other agreements, recover the price of the property delivered under the first agreement? McKnight v. Dunlop, 4 Barb., 36. Woods v. Russell, 5 B. & Ald., 942, is also in point. There a ship was built upon a special contract, to the effect that given portions of the price should be paid according to the progress of the work, to wit: part when the keel was laid, part when the light plank, and the remainder when the ship was launched. It was held that there arose a separate contract for each installment, and therefore that when the keel was laid, or any other part of the ship for which an installment was to be paid was completed, that an action could be immediately maintained to recover the installment. In Wright v. Petrie, 1 S. & M. Ch., 282, it was decided that where a contractor, constructing a railroad, is to be paid by installments as the work advances, the contract is not entire, and the contractor may recover a ratable portion of the contract price according to the amount of work done, whenever the contract may be abandoned. See Cunningham v. Morrell, 10 John R., 202; Tompkins v. Elliott, 5 Wend., 496; Goodwin v. Holbrook, 4 id., 337; Dox v. Day, 3 id., 356; Baldwin v. Mann, 2 id., 399; Sage v. Ranney, id., 532; Gould v. Allen, 1 id., 182; Read v. Moore, 19 John. R., 237; Rob v. Montgomery, 20 id., 15; Gazely v. Price, 16 id., 269; Haiden v. Kfeitsinger, 17 id., 293.

100 shares each, and after the sale received the shares, paid the price, and received a bill of parcels describing the transaction as a sale of 300 shares: it was held, that as each lot was knocked down there was a distinct contract for the sale of 100 shares, but that the subsequent dealings showed that the parties treated the transaction as one entire sale of 300 shares.(*l*)

§ **807**. The mere fact of different prices being fixed for different parts of the subject matter of the contract, will not necessarily make it divisible: so where a person went into a shop and bought various goods at distinct prices for each, the contract was still held to be single.(*m*) And where one price was fixed for the land, and another (a valuation price)(*n*) for the timber, and the vendor could not show a title to all the timber by reason of the copyhold tenure of parts of the estate, which were not distinguishable from the freehold; the court held that that was only one contract, that consequently the vendor was only bound to make out the title according to the contract, and that the title to the land was the title to the timber; and, as the conditions of sale provided for the copyhold tenure as to the lands, the contract was enforced as a whole.(*o*)

§ **808**. In a case in which, by the same contract, A. contracted to sell an estate to B., and B. contracted to sell another estate to A., the contracts in respect of the two estates were held to be independent of one another:(*p*) whilst in a case of cross contracts for the sale of goods, the court of exchequer held the contracts dependent.(*q*)

§ **809**. Where the contract itself contains a provision for its piecemeal execution, the contract is treated as divisible. So in a building contract, where the landowner agreed to grant separate leases of separate plots as and when the buildings on each plot reached a certain stage, it was held that the contract might be performed in separate parts, and that it was no answer to the builder or his assign who sued for its performance as regards one plot to show that it was not performed by the builder as regards other plots.(*r*)

(*l*) Franklyn v. Lamond, 4 C. B., 637.
(*m*) Baldey v. Parker, 2 B. & C., 37.
(*n*) Cf. Richardson v. Smith, L. R. 5 Ch., 648, and supra, § 347.
(*o*) Crosse v. Lawrence, 9 Ha., 462; Crosse v. Keene, 9 Ha., 469.
(*p*) Croome v. Lediard, 2 My. & K., 251.
(*q*) Atkinson v. Smith, 14 M. & W., 695.
(*r*) Wilkinson v. Clements, L. R. 8 Ch., 96.

§ **810**. In like manner, where there are two contemporaneous contracts which the parties intended to be separated, the court will treat them as separate, and will not allow an objection to the one contract to bar the performance of the other.(*s*)

§ **811** It is, as we have already seen, a principle of the court, that it will not compel specific performance of executory contracts unless it can at the time execute the whole contract on both sides.[1] On this principle, where there was a contract between two neighboring landholders to change the course of a stream, and one of the terms of the contract was that, if any damage should accrue to the lands of the defendant from a dam which was agreed to be erected, the plaintiff would give an equivalent in land to the defendant, the quantity of land to be ascertained by arbitrators; this being a thing which the court could not do *in præsenti*, and the court holding that the parties entering into a covenant to do it would not be a specific performance of the contract, the bill was dismissed, as the whole contract could not be carried into effect.(*t*) And where the owner of a patented invention entered into a contract with certain persons, who with himself were to form a company, to the promotion of

(*s*) Odessa Tramways Co. v. Mendel, 8 Ch. D., 235. (*t*) Gervais v. Edwards, 2 Dr. & War., 80.

[1] *Trust created under a contract.*] Where a trust has been created under a contract, which is sought to be enforced, a party cannot claim the benefit of such portions as are to his advantage, and repudiate the rest. Pajol v. McKinlay, 42 Cal., 559; see, also, Kraft v. De Forest, 53 id., 656.

Contract as to performance of future acts, which the court cannot compel.] In such case specific performance will be refused. The chancellor said in Gervais v. Edwards, 2 Dr. & W., 80: "As far as the merits of the case go, I would decree the specific performance of the contract; but I do not see how it is possible. If I do execute it at all, I must execute it *in toto*; and how can I execute it prospectively? The court acts only on the principle of executing it *in specie*, and in the very terms in which it has been made. Therefore, when you come to the specific execution of a contract containing many particulars, you must see that it is possible to execute it effectively. The court cannot say that when an event arises hereafter, it will then execute it. In the case of a decree for the execution of a contract for the sale of timber, it is no objection that it is to be cut at intervals. That is certain, and there mere delay will not prevent the court from executing it. There the agreement is executed *in specie*. The court decrees to one the very timber contracted for; to the other, the very price. If I am called on now to execute the agreement, I can only specifically execute a portion, whereas I am bound to execute all. No precedent has been cited; but, indeed, none is necessary. It is a question of principle; and I am clearly of opinion that if I give a decree now, it would not be a specific execution of the contract, but only a declaration that there ought to be a specific execution of it hereafter. I must therefore leave the plaintiff to his remedy at law." See, also, Fallon v. Railroad Co., 1 Dillon, 121; Stocker v. Wedderburn, 3 K. & J., 393.

which he was to give his services for two years, and he was to do his best to improve the invention for the benefit of the company, and on the refusal of these persons to go forward with the company, the patentee filed a bill for the specific performance of the contract: the court held, on demurrer, that as it would have been impossible to enforce against the plaintiff the stipulations on his part, he could not sue for performance; and further, that the court could not carry the contract into effect by directing the parties to execute a deed, for the contract was to do certain acts, and not to execute covenants to do them.(*u*)

§ **812**. So, again, where a contract was entered into by a shipbuilder to alter a ship, and it was agreed that in default of performance by him the owners might enter and make the alterations: default was made by the shipbuilder, whereupon the owners filed a bill to enforce their right to enter and make the alterations: but on demurrer the bill was dismissed.(*v*)

§ **813**. So wherever that which the plaintiff is to give as the consideration moving from him is something to be done at a future time, and which the court cannot enforce, specific performance of the contract will be refused.(*w*)

§ **814**. The principle that the court will not partially enforce contracts is illustrated by many other cases. Thus, where there was a partnership contract for an absolute term of years, leaving undefined the amount of capital and the manner in which it was to be provided, this being a contract which in its entirety the court could not enforce, the court refused to enforce it in part, by refusing the representatives of a deceased partner a decree for the dissolution of the partnership and the sale of the partnership property.(*x*) And in another case the court refused to separate the parts of an award which were capable of specific performance from those which were not.(*y*)

§ **815**. It is, as will have been already gathered, immaterial whether the things which the court cannot specifically enforce are to be done by the plaintiff or by the defendant.

(*u*) Stocker v. Wedderburn, 3 K. & J., 393.
(*v*) Merchants' Trading Co. v. Banner, L. R. 12 Eq., 18.
(*w*) Per Wigram, V. C., in Waring v. Manchester, Sheffield and Lincolnshire Railway Co., 7 Ha., 492.
(*x*) Downs v. Collins, 6 Ha., 418.
(*y*) Nickels v. Hancock, 7 De G. M. & G., 300. See, also, Vansittart v. Vansittart, 4 K. & J., 62, affirmed 2 De G. & J., 249.

So where the defendant agreed to grant a lease of a coal mine to the plaintiff, and the plaintiff agreed to employ the defendant as manager, specific performance of the part relative to the lease was refused.(*z*)

§ **816**. Where the contract stipulates for future acts, but is silent as to any deed to be executed to secure their performance, the court, as we have seen, will not consider the execution of such a deed any performance of the stipulation. Other cases have arisen, where the contract contemplates some deed or obligation. Where there was a contract to execute works of such a nature that the court could not superintend their performance, and in the contract was a stipulation that the contractors should give a bond to secure the performance of the contract: the court, refusing to decree performance of the works, refused also to decree the execution of the bond, as that would have been a piecemeal performance of the contract, and the stipulations as to the works were the substance of the contract, and that as to the bond only incident to them.(*a*)

§ **817**. But where the contract is to do a thing, and to execute a deed for that purpose, and this deed covers, so to say, the whole of the contract, or the whole of so much of the contract as is incapable of immediate performance, the court will, it seems, enforce the contract by the execution of the deed, though the acts to be done be future and to be done from time to time.(*b*) The real contract here which the court enforces is a contract to execute the deed.

§ **818**. In Wilson v. The West Hartlepool Harbor and Railway Co.,(*c*) the company agreed to sell to the plaintiff a plot of land near their line, and the contract contained terms as to the company laying down a branch railway, and as to the plaintiff using preferentially the defendants' line of railway. Lord Romilly, M. R., granted specific performance, and his decree was affirmed by the judgment of Turner, L. J., who held that the parties must have intended that the user of railway which was necessarily prospective should be secured by covenant. Knight Bruce, L. J., dissented. The view of Turner, L. J., appears consonant to the ordinary course of business and in furtherance of justice.

(*z*) Ogden v. Fossick, 4 De G. F. & J., 426
(*a*) South Wales Railway Co. v Wythes, 1 K. & J., 186; S. C., 5 De G. M. & G., 880.
(*b*) Granville v. Bells, 18 L. J. Ch., 32.
(*c*) 34 Beav., 187; 2 De G. J. & S., 475.

§ 819. The cases on marriage contracts strongly illustrate the principle that the entire contract must be carried into effect. With regard to these, it has been urged that as the court interfere in behalf of those who are purchasers, or considered as such by the court, but declines to aid volunteers, so when the court specifically executes a settlement, its interference should be confined to limitations in favor of purchasers, and not extended to volunteers. The court, however, has applied the principle, that the whole or no part of the contract shall be executed, to marriage contracts as well as to other contracts. "There is no instance," said Lord Hardwicke,(*d*) "of decreeing a partial performance of articles—the court must decree all or none; and where some parts have appeared very unreasonable, the courts have said we will not do that, and, therefore, as we must decree all or none, the bill has been dismissed." In a case where a husband sued the heir of his wife, who was the settlor, on a a covenant to settle land, the specific performance was not restricted to his estate, but carried to a limitation to a niece of the wife, who was, of course, a collateral.(*e*)

§ 820. The cases of exception, or, rather, of apparent exception, to the principle in question may now be considered.

§ 821. (1) It is hardly needful to repeat that the principle will not apply to contracts which, though they may be entire and single in themselves, contemplate a separate and piecemeal performance of separate parts. There, in the absence of other objection, the court will carry into effect the intention of the parties (*f*)

§ 822. (2) The principle in question is strictly applicable to executory contracts.(*g*) It does not apply, in terms, to executed contracts. In Rigby v. Great Western Railway Co.,(*h*) the company had demised the Swindon refreshment rooms to the plaintiffs for ninety-nine years; the lease contained various covenants, one of which the plaintiffs sought to enforce by injunction; an objection was made that the lease contained other covenants which the court could not enforce; and Wigram, V. C., made these observation:(*i*) "I cannot go the length of the defendant's propo-

(*d*) In Goring v. Nash, 3 Atk., 190.
(*e*) Davenport v. Bishopp, 2 Y. & C. C. C., 451; S. C., 1 Ph., 698.
(*f*) Wilkinson v. Clements, L. R. 8 Ch., 96.
(*g*) See supra, § 21.
(*h*) 15 L. J. Ch., 266; S. C., on appeal, 2 Ph. 44.
(*i*) 15 L. J. Ch., 271.

sition, that the plaintiffs are not to be protected by injunction, only because there are other covenants to be performed by them which may be possibly broken hereafter. It would be more correct to say that where the mutual rights of the parties rest in covenant, each party is *prima facie* entitled to enforce his right in equity or at law, according to the nature of the covenant which may be broken. I cannot doubt but that this court would, at the suit of a landlord, restrain a tenant for years, under a husbandry lease, from ploughing up ancient pasture, where he had bound himself by covenant not to do so ; and it would be no answer to such a bill for the tenant to say, that the landlord was under covenant to find him rough timber for repairs, which covenant might possibly be broken by the landlord before the expiration of the lease. That is a very different case from that of Gervais v. Edwards.(*j*) On the other hand, I am not prepared to go the length of the plaintiff's argument. It would not be difficult to suppose a case in which great injustice might be done by compelling a party specifically to perform a particular covenant."

§ **823**. A similar view was enunciated and acted upon by Lord Selborne in the case of Wolverhampton and Walsall Railway Co. v. London and North Western Railway Co.,(*k*) where the plaintiffs sought an injunction on the ground of the stipulations contained in a contract between the companies sanctioned by act of Parliament. It was argued that the contract contained terms, such as those providing for the proper development of local traffic, which the court could not perform : but the argument was repelled by the lord chancellor, on the ground of the distinction between injunction as a right flowing from an executed contract and the specific performance of executory contracts.

§ **824**. A familiar illustration of this difference between executory and executed contracts occurs in the case of partnership articles. The court will not, generally speaking, enforce a contract to enter into a partnership whilst it remains executory :(*l*) but, nevertheless, when the partnership has been constituted, the court will by injunction enforce the performance of particular terms, though it may be in-

(*j*) 2 Dr. & War., 80.
(*k*) L. R. 16 Eq., 433.
(*l*) Scott v. Rayment, L. R. 7 Eq., 112. See infra, § 1512.

competent to enforce all the terms:(*m*) this is the common course of practice in the court.

§ **825**. Another familiar illustration arises on leases. The court will restrain the breach of a covenant in a lease, though it may contain other covenants which the court could not possibly perform.

§ **826**. (2) The principle in question is not to be extended to all cases of legal or even equitable relief on contracts, though the contracts may be executory. The fact that future acts may have to be done under a contract is no bar to relief grounded on a right perfect in itself, and resulting from past transactions also under the contract.

§ **827**. Thus, where in a contract for the execution of railway works the contractors, previously to their completion, filed a bill against the railway company, alleging fraud in the engineer in withholding certificates of work done, and asking, amongst other things, for an account of work done: it was held on demurrer, that though the works were not complete, and though the court might not be able specifically to perform such a contract, the plaintiffs had a right, perfect in itself, of which they had been deprived by the alleged acts of the defendants, and that they were, therefore, entitled to some relief in equity.(*n*) And so, it seems, that if by a partnership contract it were stipulated that accounts should be made up half-yearly, and that one partner should have a salary proportionate to the profits to be so ascertained, he might, from time to time, institute actions to have the accounts so taken according to the contract, though its other terms might not be the subject of an action for specific performance.(*o*)

§ **828**. To this principle we may probably refer the case of Lytton v. The Great Northern Railway Co.(*p*) where, there being a contract by the company to make and maintain a siding so long as it should be of convenience, the clause as to maintaining it was held no objection to a bill for the specific performance of the contract to make it, the question of repairs being a matter for inquiry when a breach of that part of the contract should occur.

(*m*) Kemble v. Kean, 6 Sim., 333.
(*n*) Waring v. Manchester, Sheffield and Lincolnshire Railway Co., 7 Ha., 482.
(*o*) Per Wigram, V. C., in the last-cited case, 7 Ha., 496.
(*p*) 2 K. & J., 394.

§ 829. (4) In the next place, it must be observed that where the contract can be completely performed at the time, though there may be future acts dependent on it, the court will be able to grant specific performance; as, *e. g.*, a contract for the immediate sale of timber to be cut down at a future time, or at intervals, and the purchase money for it to be paid by instalments.(*q*) The cases already stated, where the court will direct the execution of a covenant to do future acts, illustrate the same principle.(*r*)

§ 830. (5) It seems very questionable whether the principle that the court will not perform part of a contract if it cannot perform all, ever applied to cases where the impossibility of carrying a part into execution was due to the default of the defendant who set up this defense.[1] To permit it to prevail, would be counter to the maxim that no man shall take advantage of his own wrong. In the case of the defendant only possessing a part of the interest which he has stipulated to sell, the defect as to the other part is, as we have seen, no bar to specific performance at the suit of the purchaser.(*s*) In one case, there was a contract between three railway companies having reference to a purchase and an amalgamation: for the purchase no further parliamentary powers were needed, but for the amalgamation they were, and, as regards one of the companies, they could not

(*q*) Per Lord St. Leonards in Gervais v. Edwards, 2 Dr. & War., 83.

(*r*) See supra, §§ 816, 817.

(*s*) Supra, § 453; and see infra, § 1222 et seq.

[1] In an action to compel specific performance for the conveyance of land, the defendant showed that performance was impossible, for the reason that title had never been in him. The case was referred against the defendant's objection. Held, that the matter should have been disposed of at the circuit; that defendant had a right to have his damages determined by a jury, and could not be deprived of it. Stevenson v. Baxter, 37 Barb., 13. Where a purchaser of land has been evicted for want of title, there being no fraud in the transaction, he has no remedy in equity; he is left to the covenants in his deed. Middlekauff v. Barrick, 4 Gill, 290. The holder of a second mortgage agreed that if he bought in his own name, or otherwise, at the sale under the foreclosure of his mortgage, he would reduce the principal sum secured by the first mortgage by paying on account of the same $3,000, and also the arrears of interest: the holder of the latter agreed to waive his right to foreclose for the whole principal and interest. Held, that under such an agreement, the plaintiff could not recover at law anything beyond nominal damages without showing that his mortgage had been foreclosed for the whole principal, and that the mortgaged premises did not bring sufficient to pay the mortgage. Livingston v. Painter, 19 Abb. Pr., 28; S. C., 28 How., 517; S. C., 43 Barb., 270. In Greene v. Westcheshire R. R. Co., L. R., 13 Eq., 44, it was held that specific performance may be decreed of an agreement, notwithstanding the plaintiff has a covenant remedy in damages, or has entered into a negotiation for a money consideration which has failed.

be obtained, because a majority of its shareholders were adverse to the scheme: in a suit relating to the purchase the last-mentioned company set up as a defense the impossibility of carrying into effect the contract as to the amalgamation; but Lord Cottenham overruled the demurrer, and doubted whether the defendant company could say to the plaintiffs that they should not have the benefit of such part of the contract as the defendants could perform, because they could not, without an act of Parliament, perform the whole, and they declined applying to Parliament to give them the necessary powers.(*t*)

§ 831. But whatever difficulties may have previously existed on this point, seem now to be removed by Lord Cairns' act (21 and 22 Vict., c. 27), and it may, it is conceived, be laid down, that wherever the thing which the court cannot enforce is a condition inserted for the plaintiff's benefit in respect of which the defendant is in default, and where the court would, before the passing of the act, have had jurisdiction to enforce the contract on the plaintiff's waiver of the condition for his benefit, there the court can now grant specific performance of the contract so far as it is enforceable specifically, and direct the defendant to pay damages for his non-performance of the condition which the court cannot specifically enforce. Thus, in Soames v. Edge,(*u*) the plaintiff had agreed to grant a lease to the defendant so soon as he should have built a new house on the land; and the defendant agreed to accept the lease when required and to build the new house: the plaintiff filed his bill praying specific performance of the contract to build and take the lease, also for damages, either in addition to or substitution for such relief: on demurrer the defendant urged that the court could not execute the contract to build; that the lease was dependent on the house being built; that the plaintiff had not waived the condition, and, consequently, that Lord Cairns' act did not apply: this argument was repelled by Lord Hatherley (then a vice-chancellor), who overruled the demurrer, and held that, on the plaintiff's waiver of the condition, he should have had jurisdiction before the act, and

(*t*) Great Western Railway Co. v. Birmingham and Oxford Junction Railway Co., 2 Ph., 597, 605. See, also, Norris v. Jackson, 1 J. & H., 319, particularly 328.

(*u*) Johns., 669.

that, therefore, since the act he could give relief as to part by way of specific performance, and as to the rest by way of damages.

§ 832. The limits of this principle are well illustrated by a case of Norris v. Jackson,(*v*) which shortly followed the case just referred to. In that case Cook, through whom the defendant claimed, in 1850 agreed with the plaintiff to grant him a lease of a certain house and farm, and on or before the 11th of October, 1852, to put the house into sufficient repair and to erect suitable coach-houses, etc., as Norris and Cook should jointly agree upon, to the intent that the house and premises should be made fit for the occupation of Norris and his family: and Norris agreed that upon due performance by Cook of the foregoing stipulations he would accept the lease. These repairs were never done: but there was no allegation in the bill that Cook had evaded giving his consent to any arrangements: and the plaintiff did not waive but insisted on his right to have such repairs done, as the court should think proper to fit the house for the occupation of himself and his family. The court held that this was beyond its powers: that there was no contract which could be performed with respect to repairs, nor any contract binding the plaintiff to take a lease till the repairs had been done. The bill was consequently dismissed on demurrer.

§ 833. (6) It was formerly laid down that where the positive part of an executory contract could not be performed by the court, it would not enforce the negative by injunction: so that, for example, where an actor had agreed to act at a certain theatre, that being a contract which the court could not enforce, it refused to restrain him by injunction from acting elsewhere:(*w*) and where there was a contract for hiring and exclusive service during seven years, and for partnership at the end of that time on such terms as should be mutually agreed on; the contract being one which the court could not perform as a whole, it refused to enforce by injunction the covenant for exclusive service.(*x*) Again, where the defendants had agreed to furnish the plaintiffs with the drawings for maps which the plaintiffs were exclu-

(*v*) 1 J & H., 319. See, too. 3 Giff., 396.
(*w*) Kemble v. Kean, 6 Sim., 333.
(*x*) Kimberley v. Jennings, 6 Sim., 340.

sively to sell; the court being unable to compel the defendants to furnish these drawings, refused an injunction to restrain the defendants from themselves selling the maps.(*y*)

§ **834**. This question was very much discussed in the case of Lumley v. Wagner,(*z*) where, there being an executory contract in part positive and in part negative, and the positive part being such as the court was unable to enforce specifically, it yet interfered in respect of the negative part by means of injunction. In that case, the defendant entered into a contract with the plaintiff to sing at his theatre, and not to sing at any other; and Lord St. Leonards granted an injunction restraining the defendant from singing at any other theatre than the plaintiff's, though the specific performance of the positive part would have been certainly beyond the court's power. The principle was acted on in some earlier cases;(*a*) but in the case just cited all the authorities on the subject were quoted.[1]

§ **835**. It has been thought to follow from the language of some parts of the judgment in Lumley v. Wagner(*b*) that the principle of that case is not confined to cases where the negative stipulation is express, but applies also to others where the negation is implied. Accordingly, in one case

(*y*) Baldwin v. Society for Diffusing Useful Knowledge, 9 Sim., 393; Clarke v. Price, 2 J. Wils., 157.

(*z*) 1 De G. M. & G., 604. See, too, Catt v. Tourle, L. R. 4 Ch., 654 (where the court considered that the covenant in question, though in terms positive, was in substance negative).

(*a*) Dietrichsen v. Cabburn, 2 Ph., 52; Great Northern Railway Co. v. Manchester, Sheffield and Lincolnshire Railway Co., 5 De G. & Sm., 138. See, also, Hills v. Croll, 1 De G. M. & G., 627 n.; S. C., 2 Ph., 60; Daggett v. Ryman, 16 W. R., 302.

(*b*) 1 De G. M. & G., 604.

[1] It does not appear, however, that the doctrine of Lumley v. Wagner has been received in this country. Cases of this nature relate to personal acts, and, although there may be cases in which damages are an inadequate relief, and a specific performance will alone answer the complete ends of justice, yet equity will only interfere where the question has reference to property of some kind. There are "numerous cases arising between landlord and tenant, and in cases of partnership, where personal covenants will be decreed to be enforced. They generally rest upon the reasons already stated, the inadequacy of the remedy at law, and the difficulty of ascertaining the damages. Thus, a covenant to give a lease, or to renew a lease, has been required to be executed, and to contain also a covenant for further renewal. So an agreement to form a partnership and execute articles accordingly, may be specifically enforced." Willard's Eq. Jur., 277. It was upon the ground of *partnership* that the doctrine of Morris v. Coleman, 18 Ves., 437, was received into this country. But it is expressly decided, that "where there is no partnership between the parties, and the defendant has violated his engagement to one theatre and formed a conflicting engagement with another, a court of equity will not interfere either *actively* or *negatively* to prevent the performance of the other." Willard's Eq. Jur., 277. And it is continued by the same author, "that the court possessing no means to enforce the contract, the parties will be left to their remedy at law." See De Rivafinola v. Kean, 4 Paige, 264, and ante, note (2), chap. 4, pt. 3.

where an actor had entered into a contract to perform on certain nights at Sadler's Wells Theatre, but without any stipulation that he would not perform elsewhere, Lord Hatherley (then Wood, V. C.) restrained him from acting at any other place than the plaintiff's theatre on the nights on which he had agreed to act there.(*c*) In Fechter v. Montgomery,(*d*) Lord Romilly, M. R., though refusing an injunction on other grounds, does not seem to have doubted the jurisdiction in a like case: and in Montague v. Flockton,(*e*) Malins, V. C., granted an injunction on a similar contract by an actor after a full discussion and consideration of the authorities.

§ 836. Another class of cases in which the courts have implied a negative are suits on charter-parties De Mattos v. Gibson(*f*) was the first case where this question arose. There the defendant Curry being about to purchase a ship contracted by charter-party with the plaintiff to carry for him a cargo of coals from Newcastle to Suez. Curry then bought the ship and mortgaged it to Gibson with notice of the charter-party. The bill was filed to restrain Gibson from interfering with the voyage contracted for: Curry was afterwards added as a defendant, and the plaintiff moved for an injunction before Lord Hatherley (then Wood, V. C.), who refused the motion on the ground that the case was not within the principle of Lumley v. Wagner,(*g*) and that the whole matter sounded in damages. The lord justices on appeal granted an injunction, Knight Bruce, L. J., holding it to be the duty and within the power of the court to prevent the commission or continuance of the breach of such a contract, when, its subject being valuable, as, for instance, a trading ship or some costly machine, the original owner and possessor, or a person claiming under him with notice, having the physical control of the chattel, is diverting it from the agreed object, that object being of importance to the others. Turner, L. J., put his judgment upon the fitness of retaining matters as they were until at the hearing the important questions in the suit should be

(*c*) Webster v. Dillon, 3 Jur. (N. S.), 432; 5 W. R., 867.

(*d*) 33 Beav., 22 See, too, Leavitt v. Williams (Jessel, M. R.), 24 Sol. Journ., 706.

(*e*) L. R. 16 Eq., 189.

(*f*) 4 De G. & J., 276, where the case can be traced through its stages up to the appeal from the hearing of the cause.

(*g*) 1 De G. M. & G., 604.

decided. The cause then came before Lord Hatherley (then Wood, V. C.), at the hearing, who, after a full argument, dismissed the bill: and his decision was brought by appeal before Lord Chelmsford, who held that a vessel under charter "ought to be regarded as a chattel of peculiar value to the charterer, and that although a court of equity cannot compel a specific performance of the contract which it contains, yet that it will restrain the employment of the vessel in a different manner, whether such employment is expressly or impliedly forbidden, according to the principle so fully expressed in the case of Lumley v. Wagner." But he affirmed the dismissal of the bill on the ground that neither of the defendants had done anything to hinder the voyage.

§ **837**. The case of Sevin v. Deslandes,(*h*) before Lord Romilly, M. R., followed De Mattos v. Gibson,(*i*) and there an injunction was granted, both on interlocutory motion and at the hearing, to restrain the defendant from doing any act inconsistent with the charter-party, which did not contain any express negative clauses.

§ **838**. It is not easy to see the limits to which the doctrine of an implied negative might be carried: for as A. and not A. include the whole world, it follows that a contract to sell to A. or to sing at A. must imply a negation of a sale to not-A. or a singing at not-A: and if injunction is to be granted where specific performance might be impossible, the logical conclusion of the doctrine would be a great and rather formidable enlargement of the jurisdiction of equity. Such an enlargement of the doctrine would be contrary to a dictum of Lord Cottenham, couched in the form of a question, in Heathcote v. The North Staffordshire Railway Co.,(*j*) where he asked: "If A. contract with B. to deliver goods at a certain time and place, will equity interfere to prevent A. from doing anything which may or can prevent him from so delivering the goods?"

§ **839**. In De Mattos v. Gibson, Lord Hatherley (then V. C.), thought the implication of a negative stipulation was to be confined to cases in which "the breach of a positive agreement involves specific damage beyond that of the

(*h*) 30 L. J. Ch., 457; 9 W. R., 218. See, too, Le Blanch v. Granger, 35 Beav., 187.
(*i*) 4 De G. & J., 276.
(*j*) 2 Mac. & G., 112.

mere non-performance of the agreement itself"—the special damage (in Miss Wagner's case) resulting from her singing elsewhere at a rival theatre, *ultra* the non-performance of her contract to sing at the plaintiff's theatre: and in another case, the same learned judge observed that the instances in which the court had found it possible to infer the negation were very few and special.(*k*)

§ **840**. In Fothergill v. Rowland,(*l*) Jessel, M. R., had before him a bill, based on a contract for the sale of all the coal from a particular colliery for a certain period, which prayed for an injunction against selling the colliery, except subject to the contract, and against disposing of the coal except for the purpose of the performance of the contract. His lordship observed that he could not find or seize any distinct line dividing the two classes of cases, that is, the class in which the court not being able to grant specific performance grants an injunction, and the class in which it does not grant the injunction: and he, therefore, following the dictum of Lord Cottenham, allowed a demurrer.

§ **841**. The doctrine in Lumley v. Wagner(*m*) has been criticised by Lord Selborne: and after his observations it is doubtful whether the mere presence of a negative stipulation can be relied on, if the contract is not such in its nature as to be the proper subject of equitable jurisdiction. "It was sought in that case," said his lordship,(*n*) "to enlarge the jurisdiction on a highly artificial and technical ground, and to extend it to an ordinary case of hiring and service, which is not properly a case of specific performance: the technical distinction being made, that if you find the word 'not' in an agreement—'I will not do a thing'—as well as the words 'I will,' even although the negative term might have been implied from the positive, yet the court, refusing to act on an implication of the negative, will act on the expression of it. I can only say, that I should think it was the safer and the better rule, if it should eventually be adopted by this court, to look in all such cases to the substance and not to the form. If the substance of the agreement is such that it would be violated by doing the thing

(*k*) Peto v. Brighton, Uckfield and Tunbridge Wells Railway Co., 1 H. & M., 468, 486.
(*l*) L. R. 17 Eq., 132. Distinguish Jones v. North, L. R. 19 Eq., 426.
(*m*) 1 De G. M. & G., 604.
(*n*) In Wolverhampton and Walsall Railway Co. v. London and North Western Railway Co., L. R. 16 Eq., 440.

sought to be prevented, then the question will arise, whether this is the court to come to for a remedy. If it is, I cannot think that ought to depend on the use of a negative rather than an affirmative form of expression. If, on the other hand, the substance of the thing is such that the remedy ought to be sought elsewhere, then I do not think that the forum ought to be changed by the use of a negative rather than an affirmative."

§ 842. The view thus plainly expressed by Lord Selborne had been indicated in an earlier case before Lord Hatherley, when vice-chancellor. The object of the bill, in that case, was to enforce the specific performance of a contract to employ the plaintiff as a broker, which contained a stipulation that the plaintiff's name should appear in all advertisements of the company. To it the defendant's demurred, and the only point on which the judge entertained any serious question was whether the stipulation as to advertisements did not bring the case within the principle of Lumley v. Wagner;(*o*) but he determined that it did not, and that as the defendants did not employ the plaintiff as broker, the court could not restrain their issue of advertisements omitting his name.(*p*)

§ 843. The position of that branch of the law on which Lumley v. Wagner is the leading authority can hardly be said to be very satisfactory. It may, it is conceived, be concluded that the principle of this case will not be extended; that negative stipulations will not be implied except in the cases where the courts have already done so; and that even the presence of an express negative stipulation will not be found a sufficient ground for jurisdiction unless the contract is of a kind of which specific performance can be granted. In other words, it is probable that the court will hereafter, except so far as it may be bound by existing authorities, consider whether the contract in respect of which the injunction is sought is or is not of a kind fit for specific performance; that, if it be, the court will tend to restrain acts inconsistent with it, whether there be negative words or not; that if it be not of a kind fit for specific perform-

(*o*) 1 De G. M. & G., 604.

(*p*) Brett v. East India and London Shipping Co., Limited, 2 H. & M., 404.

ance, no injunction will be granted, even though negative words may be present.

§ **844**. In cases where the contract on which an injunction is sought contains stipulations, some of which the court can, and others which it cannot enforce, and the latter are wholly on the plaintiff's part, no difficulty arises; because, though the court may be unable to enforce them directly, it does so indirectly, inasmuch as the moment the plaintiff fails in performing his part of the contract, the injunction would be dissolved.(*q*)

§ **845**. (7) Where an arrangement come to between two persons is intended to be of a complex character, partly legal and partly honorary, the court will, if there be no other impediment, specifically perform the legal contract, leaving the honorary part of the arrangement to rest, as was intended, on the honor of the parties. So that, where this latter part is *malum prohibitum* and not *malum in se*, it will not obstruct the court in its execution of the other part of the arrangement which amounted to contract.(*r*)

§ **846**. (7) Where the contract is in any manner alternative) so that the parts of it are mutually exclusive one of the other, and the plaintiff has a right to ask for the performance of one part, the court may treat this as independent of the other: thus, in a contract to grant a lease with an option to the lessee to purchase this option was held so far independent of the contract for a lease, that a default on the part of the plaintiff in insuring, which would have prevented his suing for a lease, did not prevent his suing on the option to purchase.(*s*)

§ **847**. (9) In one case Lord Romilly, M. R., appears to have expressed the opinion, that where a part of the contract which the court could not perform has been actually performed before suit, the incapacity of the court as to this part would furnish no defense as to the other part. But the doctrine appears to have been rejected by the court of appeal.(*t*)[1]

(*q*) Stocker v. Wedderburn, 3 K. & J., 393, 405.
(*r*) Carolan v. Brabazon, 2 Jon. & L., 200, 213.
(*s*) Green v. Low, 22 Beav., 625.
(*t*) Hope v. Hope, 22 Beav., 351; S. C., 8 De G. M. & G., 731, 746. See, also, Walrond v. Walrond, John., 18.

[1] *The court must be able to enforce the contract as to all the parties to it.*] "There is no instance of decreeing a partial performance of articles. The court must

decree all or none. And where some parts have appeared very unreasonable, the courts have said, we will not do that; and, therefore, as we must decree all or none, the bill has been dismissed." Lord Hardwick in Goring v. Nash, 3 Atk., 190; Davenport v. Bishop, 2 Y. & C. C. C., 451; S. C., 1 Phil., 698.

Nature of the contract, whether divisible or not.] This is to be determined from the nature and subject of agreement. Moore v. Bonnet, 40 Cal., 251; Hacy v. Grinnel, 50 Ill., 179; Southwell v. Beezley, 5 Oregon, 458. An agreement to sell real estate in one lot is not divisible. Raffey v. Shatcross, 2 Bro. C. C., 118(n.); S. C., 4 Mad., 227; Price v. Griffith, 1 De G. M. & G., 80. A contract to grade a railroad for a specific sum, to be paid as the work progresses, is entire. Cox v. West. Pac. R. R. Co., 44 Cal., 18; see, also, Coburn v. City of Hartford, 38 Conn., 290. A lot of coal was contracted for at a given price per ton on board vessels. Held, that none of the coal should be paid for until the delivery was complete. Shrim v. Bodine, 60 Pa. St., 182. Different prices may be paid for different articles, and yet the contract be entire. Parker v. Bergen, 4 Heisk., 590. Lord Alvanley, Ch. J., said in Johnson v. Johnson, 3 Bos. & Pull., 162: "If the question were how far the particular part of which the title has failed formed an essential ingredient of the bargain, the grossest injustice would ensue if a party were suffered in a court of law to say that he would retain all of which the title was good, and recover a proportionable part of the purchase money for the rest. Possibly the part which he retains might not have been sold unless the other part had been taken at the same time, and ought not to be valued in proportion to its extent, but according to the various circumstances connected with it. But a court of equity may inquire into all the circumstances, and may ascertain how far one part of the bargain formed a material ground for the rest, and may award a compensation according to the real state of the transaction. In this case, however, no such question arises; for it appears to me that, although both pieces of ground were bargained for at the same time, we must consider the bargain as consisting of two distinct contracts, and that one part was sold for £300 and the other for £700. It has not been suggested that they were necessary to the occupation of each other."

Example of divisible contracts.] Shaw, C. J., said in Robinson v. Green, 3 Metc., 159: "The plaintiff does not claim on an entire contract. The sale of each lot is a distinct contract. The plaintiff's claim for a compensation arises upon each several sale, and is complete on such sale. If there were an express promise to pay him a fixed sum as a compensation for the entire sale, it would have presented a different question. Where an entire promise is made on one entire consideration, and part of that consideration is illegal, it may avoid the entire contract. But here is no evidence of a promise of one entire sum for the whole service. It is the ordinary case of an auctioneer's commission which accrues upon each entire and complete sale. We do not see how the question can be answered which was put in the argument, namely; suppose the plaintiff had stopped, after selling the two lots lying in South Reading, which it was lawful for him to sell, would he not have been entitled to his commission? If he would, we do not perceive how his claim can be avoided by showing that he did something else on the same day which was not *malum in se*, but an act prohibited by law on considerations of public policy. The court are of opinion that the plaintiff's claim for a *quantum meruit* may be apportioned, and that he is entitled to recover for his services in the sale of the two lots." The matter is very fully discussed in McDaniel's v. Whitney, 38 Iowa, 60. On the following questions the court were equally divided: "Proposition made by me to Mr. McDaniels—I hereby agree to give up the banking business in Atlantic to Mr. McDaniels, and the best lot he can pick out in our town, provided he will now build upon the same, and become a permanent resident in our county, and take $16.50 per acre for the farm of 375 acres in sections 33, 34 and 38 of township 77—36 as marked blue on his plat—and give up to said McDaniels my chance of purchasing the two 40-acre lots of which Judge Temple is acting as agent. This proposition is not a standing one, but to be decided within two days from date." Beck, C. J., and Day, J., held that there were two distinct contracts, and that one of them might be specifically enforced without the other. Miller, J., and Cole J., held that there was one entire contract. Cole, J., said: "The proposition, while single in itself, yet contains an agreement on the part of

Whitney to do four things, each of which is separated from the preceding only by a comma, and is connected with the preceding by the copulative conjunction and. Mr. Whitney, by his proposition, says: I hereby agree to give up the banking business in Atlanta to Mr McDaniels, and the best lot he can pick out in our town, and take $16.50 per acre for the farm of 375 acres, and give up to said McDaniels my chance of purchasing the two 40-acre lots. There is no division of this proposition into sentences, nor any specification of the consideration the proposer is to receive for each of the four things he proposes to do. The price per acre for the land is specified. But whether such price is above or below its real or market value does not appear, either in the proposition itself, or in the evidence in the case. It may have been much above its value, and, in the contemplation of the parties, equalized by the chance of getting the two 40-acre tracts. Or, it may have been much below its value, and, in the estimation of the parties, compensated for by taking the banking business with its burdens of doubtful securities. At all events, there is nothing in the proposition itself, which specifies the consideration to be paid to the proposer for each of the four things he agrees to do, nor for any one of them. The proposition further shows that it was not binding at once, and, in any event, upon the proposer Whitney. But it was to be, and would become, binding upon him only when it should be accepted by McDaniels. What was McDaniels to do in order to accept it, and make it binding upon Whitney? He was to pick the best lot, and to build upon it, and take the banking business, and become a permanent resident of the county, and pay $16.50 per acre for the farm, and take the chance of purchasing the two 40-acre lots. He was to do all of these things before Whitney would become bound to him to do what he had proposed. McDaniels could not elect to take the banking business alone, and require Whitney to give it up. This is too clear to require demonstration, and, if he could not do this, it is just as clear that he could not require Whitney to do any other one of the several things proposed, without himself doing all that he was required to do by the proposition, and from this it must appear that the contract is no more divisible into two parts than into four."

CHAPTER XVII.

OF DEFECT IN THE SUBJECT MATTER OF THE CONTRACT.

§ 848. Another ground on which the specific performance of a contract may be resisted is the existence of some essential defect in the subject matter of it, or some variation from the description contained in the contract. This is, of course, not a question of title; the acceptance of the title will not prevent the defendant from setting up the defense that the title relates to a different subject matter from that which he contracted for.(*a*) The cases in which this variation arises between the thing and some representation made in respect of it are considered under the head of misrepresentation.(*b*) The cases in which no such representation has been made it is now proposed briefly to consider.[1]

(*a*) Bentley v. Craven, 17 Beav., 204. (*b*) Supra, § 624 et seq.

[1] *Substantial defect in the contract is a good defense in equity.*] The vendor of land received a bond for title, and gave a note therefor, which showed upon its face that it had been so given. Held, that an assignee holder of the note, in case of a deficiency, cannot recover on such note, notwithstanding he received it previous to its becoming due. Howard v. Kimball, 65 N. C., 175.

Variance between the amount of land sold and the real quantity.] Grant, J., said in Deem v. Corp., etc., 9 Ves., 368: "There was no instance of compelling a man who had contracted for a freehold, to take a leasehold estate; that where a party gets substantially that for what he contracts, any small difference may be remedied by compensation; but not where it extends to the whole estate. See, also, Holmes v. Thorp, 1 Halst 's Ch., 415; Winne v. Reynolds, 6 Paige's Ch. 407; Howard v Kimble, 65 N. C., 175; Weems v. Bremer, 2 Har. & Gill., 390; Shaw v. Vincent, 64 N. C., 690. In Wilcoxon v. Calloway, 67 N. C., 463, it was held that, where the quantity of land sold was deficient one-third, the purchaser might rescind the agreement, or demand a ratable abatement of the price. See, also, Leigh v. Crump, 1 Ired.'s Eq., 299; Gentley v. Hamilton, 3 id., 376; Jacob v. Locke, 2 id., 86; Calcraft v. Roebuck, 1 Ves., Jr, 221. Gray, J., said in Noble v. Googins, 99 Mass., 231: "The American courts have shown more willingness than the English to encourage litigation about the amount of the price, by reason of a variation in the quantity of land agreed to be conveyed, without clear evidence that the quantity was made an essential element of the bargain." See, also, Mann v. Pierson, 2 Johns., 37. "It is unnecessary for a man who has contracted to purchase one thing, to explain why he refuses to accept another." Ayles v. Cox, 16 Beav., 23; Bogan v. Daughdrill, 51 Ala., 312; Morse v. Elmendorf, 11 Paige's Ch., 288; White v. Dobson, 17 Gratt., 262; Napier v. Darlington, 70 Pa. St, 64; Lehiffer v. Pruden, 64 N. Y., 47.

Encroachment.] Where real estate is sold free of incumbrance, and the same is encroached upon by an adjoining owner, the sale may be rescinded. King v. Knapp, 59 N. Y., 462; Ring v. Bardean, 6 John's Ch., 38.

§ 849. The material distinction to be considered is between defects which are patent and visible to every one and those which are latent; for just as at common law a warranty, however general, is not taken to include defects apparent at the time of the bargain, as no one could have been deceived by them; so, whilst latent defects are a ground for refusing specific performance, patent defects are not.(c)

§ 850. Accordingly where a man bought a meadow with a road round it and a way across it which were not noticed in the description, Lord Rosslyn nevertheless enforced specific performance with costs:(d) and the circumstances that an estate described as inclosed in a ring-fence was not so, was held by Grant, M. R., no defense to a suit for performance.(e)

§ 851. But where the objection taken by the purchaser, who was defendant, was the existence of certain water easements, and it was proved that the defendant had long lived in the neighborhood, was well acquainted with the property, had in passing the road constantly seen some of the wells on the lower land supplied from the upper land, which was the subject of the contract, and had on the morning of the sale been upon the land; Knight Bruce, V. C., expressed his opinion, but without giving the reasons, that no such degree of knowledge or notice had been proved as to preclude the purchaser from taking the objection.(f) In this case, it may be observed, the objection to the upper lands was the existence of certain rights granted with the lower lands to enter the upper lands, fetch water from a spring, and to cut and cleanse gutters for the conveyance of the water to the lower lands and similar easements. Now, the wells, gutters and all the other objects of sense, might probably have existed without necessarily involving these easements; and, if so, it follows that the defect was, in its nature, latent and not really patent.

§ 852. With regard to the latency of defects, it is to be observed that the court will not demand a minute examina-

(c) Dyer v. Hargrave, 10 Ves., 505; supra, § 658; cf. Pothier, Tr. du Contrat de Vente, Part II, chap. 1, sect 3, § 1.

(d) Oldfield v. Round, 5 Ves., 508, and see Pope v. Garland, 4 Y. & C. Ex., 404; Cook v. Waugh, 2 Giff., 201.

(e) Dyer v. Hargrave, 10 Ves., 505.

(f) Shackleton v. Sutcliffe, 1 De G. & Sm., 609.

tion on the part of the purchaser, even where the vendor does not make any representation:(*g*) to render a defect patent it must, it seems, be an obvious and unmistakable object of sense.

§ 853. The defect need not be in the actual physical subject-matter of the contract, it may consist in the existence of some liability of which the other party is ignorant; so a vendor of a lease described as subject to the usual covenants cannot, of course, enforce specific performance where the lease is subject to unusual ones:(*h*)[1] and so where the vendor of leasehold property had, before the sale, received from his landlord a notice of re-entry in default of the premises being repaired, and did not communicate the existence of this notice to the purchaser, who, however, knew of the state of the premises, the contract was held void at the suit of the purchaser who had been ejected:(*i*) and at common law the undisclosed fact that the property in question is liable to be taken under the powers of an act of Parliament, has been held a valid ground for rescinding the contract.(*j*)[2]

(*g*) Cf. per James, L. J., in Denny v. Hancock, L. R. 6 Ch., 12.

(*h*) Hampshire v. Wickens, 7 Ch. D., 555 (where the subject of what are usual covenants is fully considered, as regards leaseholds); cf. Tildesley v. Clarkson, 30 Beav., 419.

(*i*) Stevens v. Adamson, 2 Stark., 422.

(*j*) Ballard v. Way, 1 M. & W., 520. Distinguish from the cases cited in this section, Edwards Wood v. Marjoribanks (1 Giff., 381; 3 De G. & J., 329; 7 H. L. C., 806), where the purchaser of an advowson was held not entitled to any compensation in respect of a charge on the living under a grant from Queen Anne's Bounty.

[1] In Willis v. Astor, it was held that where there was a covenant to renew a lease at a given rent, and nothing more, that this does not carry with it the covenants of the old lease. A lease contained a covenant for renewal. Held, that the renewed lease need not contain a covenant for further renewal, unless the original instrument contained an express covenant for perpetual renewal. Rutgers v. Hunter, 6 Johns., 215; Phyfe v. Wardell, 5 Paige's Ch., 268. Where a lease has been assigned, the assignee is entitled to specific performance of a covenant to renew. Robinson v. Perdy, 21 Ga., 183. Where the lessor covenants to extend a lease, without naming the amount of rent; held, that equity would not enforce the covenant. Robinson v. Kettletas, 4 Edm.'s Ch., 63.

[2] Seaman v. Hicks, 8 Paige, 655, is a case precisely in point. It was there said that where the purchaser of lands contracts for a perfect title, he was relieved from a performance of the contract upon its appearing that the corporation of the city, in which the land was situated, were empowered to take a portion of the land, without compensation for the buildings thereon, though the probability that such power would be exercised as very remote. Durrett v. Simpson, 3 Monr., 517, affords an illustration of the same doctrine, that a purchaser shall be compelled to take only that for which he contracts. In that case A. sold to B. a lot of land, with a hotel on it, which was supplied with water by pipes leading from a spring owned by A., and situated some three hundred yards from the hotel. A. stipulated in his contract "that the privilege of the water works, as they now are, shall remain to B. forever," and the

§ **854**. The existence of a defect, unknown at the time of the contract both to the vendor and the purchaser, will not, it seems, be a bar to the enforcement of the contract,(*k*) unless, probably, where the defect is such as lies properly in the knowledge of the vendor.

§ **855**. Where the variation between the thing and the description of it seems rather in the nature of an excess than of a defect, and so in favor of the purchaser, the vendor is nevertheless disabled from enforcing the contract on an unwilling purchaser. Thus, freehold land cannot be forced on a purchaser who bought it as copy-hold. "It is unnecessary," said Lord Romilly, M. R., "for a man who has contracted to purchase one thing to explain why he refuses to accept another.(*l*)

§ **856**. Where an uncertainty exists as to the subject-matter of the contract, but the description by which it was sold is eqully uncertain, there is, of course, no variation or defect. Therefore where property was sold by a general description as being part freehold and part leasehold, and the exact boundary between the freehold and leasehold parts of the estate could not be ascertained, this circumstance furnished no defense to a suit for specific performance.(*m*)

§ **857**. A purchaser may, of course, contract for the pur-

(*k*) Per Wigram, V. C., in Lucas v. James, 8 Ha., 418. See, also, Parkinson v. Lee, 2 East, 314

(*l*) Ayles v. Cox, 16 Beav., 23. See the observations of Lord St. Leonards on this case, Vend., 251; cf also Stanton v. Tattersall, 1 Sm. & G., 529. Copyholds cannot, of course, be forced on a purchaser of freeholds: Hick v. Phillips, Prec. in Ch. 575; cf. Twining v. Morrice, 2 Bro. C. C., 331.

(*m*) Monro v. Taylor, 3 Mac. & G., 713. As to conditions respecting such a mingling of tenures, see, also, Crosse v. Laurence, 9 Ha., 462; Crosse v Keene, id., 469; cf. Jefferys v. Fairs, 4 Ch. D., 448. Davis v. Shepherd (L. R. 1 Ch., 410) is, of course, clearly distinguishable.

privilege of the conveyance of the water "as it now is." After this contract, B. sold the spring and the intervening lands, reserving, in all the deeds but one, the right of entering and repairing the pipes, and in that one it was stipulated that the pipes should remain undisturbed." B. having paid all the purchase money before the day when the property was to have been delivered, refused to accept a conveyance, and filed his bill for a rescission of the contract, and recovery of the money paid by him. Held, that the contract should be rescinded, and that A. should refund the price paid by B., the rents, during the time B. occupied the premises, to be set off against the interest. Durrett v. Simpson, 3 Monr., 517. Though equity does not demand a minute examination by the purchaser, it nevertheless requires that he should, at least, exercise due diligence. So, where land was sold by a trustee under a deed of trust, and the purchaser could, by the exercise of proper diligence, have ascertained whether the land was subject to any rights of dower, equity refused to relieve the vendee from his contract, because a right of dower in the land did exist, and he was left to his legal remedy, in case he should at any time be disturbed in his possession. Greenleaf v. Queen, 1 Pet., 138.

chase of a thing with all faults, and he then take on himself the knowledge of the title and of the qualities of the subject. The cases on the effect of this clause in a contract seem to show, first, that such a contract is binding, however many may be the defects in the subject, and whether they be latent or patent, and whether discoverable by the purchaser or not;(*n*) secondly, that it will not protect the vendor where he takes positive means to conceal the defects,(*o*) as where a vessel was moved off her ways where she lay dry into the water in order to conceal her worm-eaten bottom and broken keel;(*p*) and thirdly, that it will not protect the vendor when he make a misrepresentation, and that misrepresentation is embodied in the contract,(*q*) or is both false and fraudulent.(*r*) The court refuses to direct any inquiry as to title where the sale is with all faults, and the vendor only sells such interest as he has.(*s*)[1]

§ **858**. The effect on the specific performance of the contract of a defect in the thing sold, or a variation from the description, is two-fold, according to its magnitude. If, in the view of the court, it be unessential, the contract may yet be performed, but with compensation: if it be essential, it confers on the party injured the right of rescinding the contract and defeating its performance.(*t*)[2] The distinc-

(*n*) Baglehole v. Walters, 3 Camp., 154; Pickering v Dowson, 4 Taunt., 779, overruling Lord Keynon, M. R.'s decision in Mellish v. Motteux, Peake, 115, that the stipulation in question only applies to faults which the purchaser can discover or the vendor is ignorant of

(*o*) Baglehole v. Walters, 3 Camp., 154.

(*p*) Schneider v. Heath, 3 Camp., 506.

(*q*) Schneider v. Heath, 3 Camp., 506.

(*r*) Early v. Garrett, 9 B. & C., 928; Springwell v Allen, 2 East, 448 n.

(*s*) See infra, § 1287 See, also, Hume v. Pocock, L. R. 1 Eq., 423; 1 Ch., 379.

(*t*) Stanton v Tattersall, 1 Sm. & G., 529; Turquand v. Rhodes, 16 W. R., 1074; cf McKenzie v. Hesketh, 7 Ch D., 682.

[1] So, where the vendee of land agreed to risk the title as to a small part of the land which the vendor represented might be covered by an adverse claim, and said claim was afterwards successfully asserted, it was held that the sale should not be rescinded on that account, nor the value of it discounted from a note for the purchase money held by an assignee of the vendor, but that the vendee's remedy was on the warranty. Cates v. Raleigh, 1 Monr., 164; see, also, Winne v. Reynolds, 6 Paige, 407.

[2] A specific performance will be decreed where the vendor is able to perform his contract in substance, although there is a trifling variation in the description of the premises, or a trifling incumbrance on the title which cannot be removed, and which is a proper subject of compensation to the purchaser. Winne v. Reynolds, 6 Paige, 407. And on a bill by a vendee for the specific performance of an agreement for the sale of lands, a slight variation or default, on the part of the vendee, in the performance of work to be done by him before the deed was to be delivered, will not prevent a decree for specific performance, if the difference is a proper subject for compensation in money. Humes

tion between these two classes of cases will be considered in the chapter on compensation.(*u*)[1]

(*u*) Part V, chap. 3, § 1174 et seq.

v. Thorpe, 1 Halst.'s Ch. (N. J.), 415. King v. Bardeau, 6 John.'s Ch., 38, is a case belonging to the same class. It was a case of sale of property at auction; and though the description was substantially true, there was a slight variation or defect in the property over the description. And it was held that where two adjoining lots are sold together, in one parcel, and for one price, and on one of the lots were buildings which projected two feet over on the other lot, that this did not constitute so material a defect in the subject matter as to warrant the abandonment of the contract by the purchaser. But, as the projection was not so obviously visible as to conclude the purchaser, if he had exercised ordinary diligence, and, as the vendor, in the advertisement of sale, described the buildings as being on one of the lots, the court granted the purchaser compensation for the diminution of value occasioned by this projection, to be deducted from the price.

[1] *Subject matter of the contract accidentally destroyed.*] Where the owner of real estate agreed to sell the same for a definite sum, and before it is paid a house, upon the premises, is accidentally destroyed by fire; held, that no part of the purchase money could be rescinded or retained by the vendor. Bacon v. Simpson, 3 M. & M., 78; Wells v. Colman, 107 Mass., 514; Thompson v. Gould, 20 Pick., 134. In Snyder v. Murdock, 51 Mo., 175, it was held, that where an executory contract for the sale of real property had been made, and a bond for title and notes given in payment for the property, that the same was then at the risk of the purchaser, and that it was his loss if it was destroyed by fire. A written contract was made for the purchase of land, and the buildings thereupon were accidentally destroyed by fire. Held, that neither party could rescind such contract, unless the buildings were the principal inducement of the purchase. Banty v. Kuworth, 1 Montana, 133. There was a spring of water on land of the vendor, which was conveyed in passes to the land of the vendee, and was a great inducement to the purchase. Held, that the destruction of the water privilege after the sale, and before conveyance, would furnish a sufficient ground for abandoning the contract. Durett v. Simpson, 3 Monr., 517.

CHAPTER XVIII.

OF THE WANT OF A GOOD TITLE.

§ 859. Where the vendor of land sues the purchaser for a specific performance of the contract, the defendant is entitled to have the action dismissed, if it appear that the plaintiff cannot make out to the land a title free from reasonable doubt.[1] The defendant may have the action thus dismissed at the trial, provided the defect in title has been prominently put forward in the pleadings, and the court can then decide the question,(*a*) or even where the objection appears on the evidence at the trial, and is a different objection from that on which the defendant had relied.(*b*) But the question more usually arises after the reference to title has been made.[2]

(*a*) Lucas v. James, 7 Ha., 418, 425.

(*b*) Baskcomb v. Phillips, 29 L. J. Ch., 380; 6 Sur. N. S., 363.

[1] Watts v. Waddle, 1 McLean, 200; Bates v. Delavan, 5 Paige, 299; Gans v. Renshaw, 2 Barr., 34; Fitzpatrick v. Featherstone, 3 Ala., 49; Beckwith v. Kouns, 6 B. Monr., 422; Owings v. Baldwin, 8 Gill., 337. And it is not necessary that the vendee should stipulate in the contract that a covenant of warranty shall be inserted in his deed. This will be presumed, unless the vendee expressly takes the risk of title. Bates v. Delavan, 5 Paige, 279. An agreement to give good and sufficient deeds to lands, must be construed to mean deeds in fee simple. New Barbadoes Toll Bridge v. Vreeland, 3 Green's Ch., 157. It is sufficient if the vendor is able to make a good title at any time before the decree is pronounced, although he had not a good title when the contract was made. Hepburn v. Auld, 5 Cranch, 262, 275; Finley v. Lynch, 3 Bibb., 366; Seymour v. Delancey, 3 Cowen, 445; Pierce v. Nichols, 1 Paige, 244; Cotun v. Ward, 3 Monr., 304; Baldwin v. Salter, 8 Paige, 473; Dutch Church v. Mott, 7 id., 78; Poole v. Shergold, 2 Bro. C. C., 119. An exception to this rule is where a contract is made in bad faith by one who knows that he has neither title nor the legal or equitable means of acquiring one. Moss v. Hanson, 17 Penn. (5 Harris), 379.

[2] *Excess or deficiency of real estate sold.*] Where there is no designated quantity, and the estate is sold in gross, a party can have no relief in equity either for an excess or deficiency. The case must, of course, be devoid of fraud. Kent v. Carcand, 17 Md., 291; Gilman v. Hincle, 8 W. Va., 262; Foley v. McKeown, 4 Leigh, 678. Where the land was sold by the acre, the number sold must be found. Wilson v. Randall, 67 N. Y., 338. Where the estate sold is described by boundaries, or equivalent words to more or less are used, such a statement will control a statement as to boundary or quantity, and a surplus or deficiency will not be a sufficient reason for relief at equity, unless there is such great variation as to give rise to the presumption of gross fraud or mistake. Stebbins v. Eddy, 4 Mason, 414; Marvin v. Bennett, 8 Paige's Ch., 312;

§ **860**. The old practice of the court of chancery, in all cases of dispute as to the title of the estate sold, was to decide either for or against the validity of the title, and either to compel the purchaser to take it as good, or to dis-

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Winch v. Winchester, 1 Ves. & B., 375; Stull v. Hurst, 9 Gill., 446; Morris Canal Co v. Emmett, 9 Paige's Ch., 168; Ketchum v. Stout, 20 Ohio, 453; Faure v. Martin, 3 Seld., 210; Noble v. Goggins, 99 Mass , 231. In Hudson v. Hudson, 64 Ga., 513, it was held, that although the contract described the estate as containing one hundred acres more or less, yet the vendee was entitled to no abatement, notwithstanding a deficiency was discovered of thirty-six acres.

Where real property is sold, the vendor must give a good title.] Equity will not decree specific performance of a contract for the purchase of real property, where the vendor, for any reason, cannot give a perfect title. He must be the owner, and he must have the legal or equitable right to convey. Lay v. Huber, 3 Watts, 367; Garnett v. Macon, 2 Brock., 185; Fitzpatrick v. Featherstone, 3 Ala., 40; Pipkin v. James, 1 Humph., 325; Hurley v. Brown, 98 Mass., 545; Morgan v. Morgan, 2 Wheat , 290; Tomlin v. McChord, 5 J. J. Marsh., 135; Owings v. Baldwin, 8 Gill., 337; Stevenson v. Buckstone, 15 Abb. Pr , 352; Nicol v. Carr, 35 Pa. St., 381. It makes no difference that the land has been sold under a decree of the court, if the title is imperfect. Coster v. Clark, 3 Edm.'s Ch., 428. An injunction against collecting the purchase price was granted until the title should be made perfect, in a case where the vendor fraudulently represented that he had an absolute title. Hinkle v. Margerum, 50 Ind., 240; Davis v. Perkins, 40 Iowa, 82. Where a party holding the legal title, sold for a valuable consideration, it was held, that his vendee, without notice of outstanding equities, took the property divested of such equities. Farmers' Nat. Bank v. Fletcher, 44 Iowa, 252. In order that the vendor shall maintain a decree for specific performance, he must show, to a moral certainty, that the vendee will receive such a title as he contracted for. Hinckley v. Smith, 51 N. Y., 21; Welsh v. Barton, 24 Ohio St., 28. Real property was sold at auction, warranted free from incumbrance, and a vendee paid full value for the property. Held, that where he afterwards discovered that there were mortgages upon it, he was not bound to retain the property. Mayer v. Adrian, 77 N. C., 83.

Specific performance will not be decreed where the title is doubtful.] The court said in Dobbs v. Norcross, 24 N. J. Eq., 327. "Every purchaser of land has a right to demand a title, which shall protect him from anxiety, lest annoying, if not successful, suits be brought against him, and probably take from him, or his representatives, land upon which money was invested. He should have a title which should enable him not only to hold his land, but to hold it in peace, and, if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value " See, also, Pyrke v. Waddington, 10 Hare, 1; Sturtevant v. Jaques, 14 Allen, 525; Griffin v. Cunningham, 19 Gratt , 571; Richmond v. Gray, 3 Allen, 25; Voorhies v. De Myer 3 Sandf.'s Ch., 614; Swayne v. Lyon, 67 Pa. St., 436; Smith v. Turner, 50 Ind., 367; Jeffreys v. Jeffreys, 117 Mass., 184. Lord Eldon, Chancelor, said in Stapylton v. Scott, 16 Ves., 272, that the doubt, in order to prevent specific performance, must be "considerable and rational, such as would and ought to induce a prudent man to pause and hesitate; not based on captious, frivolous and astute niceties, but such as produce real *bona fide* hesitation in the mind of the chancellor." See Kostenbader v. Spotts, 80 Pa. St., 430.

Long continued naked possession, specific performance.] Specific performance will not be decreed, and a purchaser compelled to accept the title, which rests merely in naked possesion; even twenty years uninterrupted possession is not sufficient to raise the presumption of a conveyance. Cunningham v. Sharp, 11 Humph., 116; Lewis v. Herndon, 3 Litt., 358; Smith v. Hollenbeck, 57 Ill., 223; see, however, Stroher v. Dutton, 6 Phila., 185; Chapman v. Lee, 55 Ala., 616.

miss the bill on the score of its being bad.(*c*) But the case of Marlow v. Smith,(*d*) before Jekyll, M. R., followed by Shapland v. Smith,(*e*) before Lord Thurlow, established the practice of allowing a class of titles which, without affirming them to be bad, the court considered so doubtful as that it would not compel a purchaser to take them.(*f*)

§ **861**. Lord Eldon, though feeling himself bound to adhere to this as an established rule, on more than one occasion expressed his dissent from it on principle, and bewailed the great mischiefs which had resulted from it.(*g*) But such expressions of opinion did not shake the rule: and it has been recognized by the House of Lords as one of the established rules of a court of equity.(*h*)

§ **862**. Against the rule it has been urged that it is logically absurd, as well as practically injurious; for every title is good or bad, and if so, the court ought to know nothing of a doubtful title. For the rule it has been urged in effect that, having regard to the nature of an action for specific performance, the rule in question is necessary in point of practical justice, and correct in reasoning. It must be remembered that the judgment of the court in such an action is *in personam* and not *in rem;* that it binds only those who are parties to the action, and those claiming through them, and in no way decides the question in issue as against the rest of the world;(*i*) and that doubts on the title on an estate are often questions liable to be discussed between the owner of the estate and some third person not before the court, and, therefore, not bound by its decision.(*j*) If, therefore, there be any reasonable chance that some third person may raise a question against the owner of the estate after the completion of the contract, the court may consider this to be a circumstance which renders the bargain a hard one for the purchaser, and one which in the exercise of its discretion it will not compel him to execute. Though every title must in itself be either good or bad, there must be

(*c*) See 1 Bro. C. C., 76, n.

(*d*) 2 P. Wms., 198.

(*e*) 1 Bro. C. C., 75. Lord Eldon was in the habit of treating this as the first case in which the later rule had prevailed: but in Sloper v. Fish, 2 V. & B., 149, Grant, M. R., referred to the earlier cases, and stated that the rule in question had been repeatedly acted on by Lord Hardwicke.

(*f*) See, also, Cooper v. Denne, 4 Bro. C. C., 80; S. C., 1 Ves. Jun., 565; Sheffield v. Lord Mulgrave, 2 id., 526; Roake v. Kidd, 5 id., 647; Willcox v. Bellaers, T. & R. 491

(*g*) In Vancouver v. Bliss, 11 Ves., 465, and in Jerroise v. Duke of Northumberland, 1 J. & W., 568

(*h*) See per Lord Westbury in Parker v. Tootal, 11 H. L. C., 158

(*i*) See per Jessel M. R., in Osborne to Rowlett, 13 Ch. D., 781.

(*j*) See per Turner, V. C., in Glass v. Richardson, 9 Ha., 701.

many titles which the court cannot pronounce with certainty to belong to either of these categories in the absence of the parties interested in supporting both alternatives, and without having heard the evidence they might have to produce, and the arguments they might be able to urge: and it is in the absence of these parties that the question is generally agitated in proceedings for specific performance. The court, when fully informed, must know whether a title be good or bad; when partially informed, it often may and ought to doubt.[1]

§ 863. It is by no means easy to express what amount of doubt upon a point there must be, to induce the court to refuse specific performance: and this difficulty has been increased by the ebb and flow of judicial opinion and decision for and against the rule, which has characterized the cases of the last quarter of a century. One mode of measuring the doubt has been by applying the question, whether it is such a title as that the judge himself would lend his own money upon it. The court "has almost gone the length," said Lord Eldon, "of saying that unless it is so confident that if it had £95,000 to lay out on such an occasion, it would not hesitate to trust its own money on the title, it would not compel a purchaser to take it."(*k*)

§ 864. In another case, Lord Eldon put the question for the court as being, "whether the doubt is so reasonable and fair, that the property is left in his (the purchaser's) hands not marketable:"(*l*) but a marketable title being "one which, so far as its antecedents are concerned, may at all times and under all circumstances be forced on an unwilling purchaser,"(*m*) the observation seems not much to assist us in measuring how great the doubt must be.

§ 865. It was formerly held that, though the court might entertain an opinion in favor of the title, yet if it were satisfied that that opinion might fairly and reasonably be ques-

(*k*) In Jervoise v. Duke of Northumberland, 1 J. & W., 569. See, also, Sheffield v. Lord Mulgrave, 2 Ves. Jun., 526; per Turner, V. C., in Pyrke v. Waddingham, 10 Ha., 9.

(*l*) In Lord Braybroke v. Inskip, 8 Ves., 428.

(*m*) Per Turner, V. C., in Pyrke v. Waddingham, 10 Ha., 8.

[1] It has repeatedly been decided that equity will not compel a vendee to take a *doubtful* title. Butler v. O'Hear, 1 Des., 382; Lewis v. Herndon, 3 Litt., 158; Kelly v. Bradford, 3 Bibb, 317; Seymour v. Delancey, 1 Hop., 436; Young v. Lillard, 1 Marsh., 482; Morgan v. Morgan, 2 Wheat., 290; Longworth v. Taylor, 1 McLean, 200.

tioned by other competent persons, it would refuse specific performance. Thus, in a case before Leach, V. C., he expressed the strong inclination of his opinion to be in favor of the title, and yet refused the relief sought by the plaintiff;(*n*) and in the case of Pyrke v. Waddingham,(*o*) in which Turner, V. C., discussed the subject now before us, he expressed an opinion in favor of the title, but, nevertheless, dismissed the vendor's bill, with costs. For this reason it was held that the court would not force a title on a purchaser in opposition to the decision of another court, though it might think that decision to be wrong.(*p*) Accordingly, the court of appeal in chancery in one case dismissed an appeal, though thinking the title good, on the ground of the opinion of the judge below:(*q*) though the same measure of deference was not extended to the opinion of a conveyancing counsel of the court.(*r*)

§ **866**. But these cases cannot now be relied on; for, since the case of Pyrke v. Waddingham, there have been something like a reaction against that case, and a tendency to lessen the area of doubt as regards titles.

The very same title which Turner, V. C., refused to force on a purchaser in Pyrke v. Waddingham, was forced on another purchaser by Lord Romilly, M. R., not on the ground that the principles laid down in that case were erroneous, but that they did not justify the decision.(*s*)

§ **867**. And so as regards the decision of an inferior court: the judges of the court of appeal have held that they are in no wise bound by such decision, and that where they consider that there is no reasonable doubt, the adverse decision of the inferior court will not be a sufficient reason to refuse the plaintiff relief.(*t*)

§ **868**. "With respect to the common cases of doubtful title," said Lord St. Leonards, "I cannot agree with the proposition, that an unfavorable decision in the court of inferior jurisdiction renders the title doubtful. The judge

(*n*) Price v. Strange, 6 Mad., 159, 164.

(*o*) 10 Ha., 1; cf. Rogers v. Waterhouse, 4 Drew., 329.

(*p*) Rose v. Calland, 5 Ves., 186.

(*q*) Collier v. McBean, L. R. 1 Ch., 81; and see Hamilton v. Buckmaster, L. R. 3 Eq., 323.

(*r*) Hamilton v. Buckmaster, L. R. 3 Eq., 323.

(*s*) Mullings v. Trinder, L. R. 10 Eq., 449. See, also, [illegible] v. Hutchens, 32 Beav., 615 (lis pendens), and Wrigley v. Sykes, 21 Beav., 337. See, also, Highgate Archway Co. v. Jeakes, L. R. 12 Eq., 9; Bell v. Holtby, id., 193; Austin v. Tawney, L. R. 2 Ch., 143; Osborne to Rowlett, 13 Ch. D., 774, 781; Wise v. Piper, id., 848, 855.

(*t*) Beioley v. Carter, L. R. 4 Ch., 230; Alexander v. Mills, id. 6 Ch., 124; Radford v. Willis, id. 7 Ch., 7, reversing S. C., L. R. 12 Eq., 105.

of the superior court would still be bound to exercise his own discretion and decide according to his own judgment."(*u*) This language has been cited with approval by the court of appeal in chancery in England.(*v*)

§ **869**. The doubt which may prevent the court from compelling the purchaser to accept a title may be a doubt either of law or of fact: and, as to law, it may be connected with the general law of the realm,(*w*) or with the construction of particular instruments:(*x*) and, as to fact, it may be in reference to facts appearing on the title, or to facts extrinsic to it.(*y*) Again, it may be about a matter of fact which admits of proof, but has not been satisfactorily proved,(*z*) or about such a matter as from its nature admits of no satisfactory proof, as the negative proposition that there was no creditor of the vendor capable of taking advantage of an act of bankruptcy.(*a*)

§ **870**. It is not easy to give any perfect classification of the doubts which would and of those which would not prevail with the court, but the following attempt may not be useless. The court would, it is conceived, consider the title doubtful in the following cases:[1]

(*u*) Sheppard v. Doolan, 3 Dr. & War., 8. See, too, per Jessel, M. R., in Osborne to Rowlett, 13 Ch. D., 781 Consider Cook v. Dawson, 3 De G. F. & J., 130.

(*v*) In Beioley v. Carter, L. R. 4 Ch., 236, 240.

(*w*) Sloper v. Fish, 2 V. & B., 145; Blosse v. Lord Clanmorris, 3 Bli., 62; but as to this see §§ 770, 771.

(*x*) Lincoln v. Arcedeckne, 1 Coll., 38; Bristow v. Wool, id., 480; per Turner, V. C., in Pyrke v. Weddingham, 10 Ha., 9.

(*y*) Id.

(*z*) Smith v. Death, 5 Mad., 371.

(*a*) Lowes v. Lush, 14 Ves., 547.

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[1] *Right of dower as an incumbrance.*] The vendor agreed to convey, free of all incumbrances. Held, that the vendor was not obliged to accept the property, incumbered with an outstanding inchoate right of dower. Shearer v. Ranger, 22 Pick., 447; Smith v. Connell, 32 Me., 126; Heimburgh v. Ismay, 35 N. Y. Sup. Ct., 35; Prescott v. Truman, 4 Mass., 629; Henderson v. Henderson, 13 Mo., 152; Holmes v. Holmes, 12 Barb., 137; *contra*, see Obermyce v. Oberty, 17 Ohio, 71; Manson v. Brimfield Manuf'g Co., 3 Mason, 855; Blair v. Rankin, 11 Miss., 440. Rawle on Covenants, says, pages 138, 139: "It is one of the best settled principles of the law of vendor and purchaser, that, as a general rule, the right of the latter to a title, clear of all claims whatever, present and future, fixed or contingent, is one of which he cannot be deprived but by his own acts. It is a right, as has been often observed by the greatest equity judges, given by the law, and not springing from the contract of the parties."

Doubtful title need not be accepted] If a reasonable objection is found to exist against the title to real property, specific performance will not be decreed against the vendee. If there is a cloud on the title, rendering it doubtful, he need not take the property. Vanconner v. Bliss, 11 Ves., 458; Howarth v. Smith, 6 Sim. 161; Dutch Church v. Mott, 7 Paige's Ch., 77; Bartlett v. Blanton, 4 J. J. Marsh., 426; Starnes v. Allison, 2 Head (Tenn.), 221; Shapland v. Smith, 1 Bro. C. C., 75; Mullins v. Trinder, L. R., 10 Eq., 449; Sloper v. Fish, 2 Ves. & Bea., 145; Collier v. McBlau, L. R., 1 Ch., 81; Sohier v. Williams, 1 Curtis

(1) Where the probability of litigation ensuing against the purchaser in respect of the matter in doubt is considerable, or, as it was put by Alderson, B.,(*b*) where there is "a reasonable decent probability of litigation." The court, to use a favorite expression, will not compel the purchaser to buy a lawsuit.(*c*)

(2) Where there has been a decision by a court of co-ordinate jurisdiction adverse to the title or to the principle on which the title rests, though the court thinks that decision wrong.(*d*)

(3) Where there has been a decision in favor of the title which the court thinks wrong.(*e*)

(4) Where the title depends on the construction and legal operation of some ill-expressed and inartificial instrument, and the court holds the conclusion it arrives at to be open to reasonable doubt in some other court.(*f*)

(*b*) In Cattell v. Corrall, 4 Y. & C. Ex., 237 (*c*) Price v Strange 6 Mad., 159, 165; Sharp v. Adcock, 4 Russ., 374; Heseltine v. Simmons, 6 W. R., 268; Pegler v. White, 33 Beav., 403. Consider Potter v Parry, 7 W. R., 182; Burnell v. Firth, 15 W. R., 546.

(*d*) Per Lord Romilly, M. R., in Mullings v. Trinder, L. R. 10 Eq., 454.

(*e*) Id.

(*f*) Per James, L. J., in Alexander v. Mills, L. R. 6 Ch., 132.

C. C., 470; Seymour v. Delancy, Hopk.'s Ch., 436; S. C., 5 Cow., 714; Jarman v. Daviss, 4 T. B. Mon., 115; Hightower v. Smith, 5 J. J. Marsh., 542; Beckwith v Korms, 6 B. Mon., 222; Sturtevant v. Jaques, 14 Allen, 523; Swayne v. Lyon, 67 Pa. St., 436; Young v. Rothlare, 1 C. E. Green, 224; Powell v. Connant, 33 Mich., 396; Griffin v. Cunningham, 19 Gratt., 571; Lowrey v. Muldron, 8 Rich.'s Eq., 241; Butler v. O'Hear, 1 Des.'s Eq., 382; Collins v. Smith, 1 Head (Tenn.), 251; Littlefield v. Linsley, 26 Tex., 353; Snyder v. Spalding, 57 Ill., 480. For a most instructive case, setting out the defects which will induce a court of equity to refuse the vendor aid in a case where there is doubt in relation to title. See Dalzell v. Crawford, 1 Pars. Sel. Cas., 37. Baron Park said, in Cadwallader v. Pierce, 11 Jur., 132: "This is not the only case in which courts of law are called on to determine questions appertaining to courts of equity. Where a man sells an estate, we are called on to say whether the title he offers is a good one both at law and in equity, and the point before us in such cases is, can such good title be made?" Malins, V. C., said, in Bell v. Holtly, L. R., 15 Eq., 178: "Where doubtful cases of construction arise, whether on an act of Parliament or the words of an instrument or a will, it is the duty of this court to remove that doubt by deciding it; and instead of feeling a doubt whether other judges, at other times, may think in the same way with them. I consider it the duty of the court to assume that that which a competent tribunal has at one time decided, will be followed at future times, and that that which judges at the present time think right, is to be assumed judges of equal competency in the future will think right also." Lord Eldon said in Vancouver v. Bliss, 11 Ves., 465, "he recollected the period when it was the office of the court to decide whether the title was good or not, and it was thought better that the dry rule should prevail that, if the title was good, the purchaser should take it, than that the court should speculate upon the point whether there was more or less difficulty in the title, and say in one case he should take it, in another he should not. The old course was, that if the parties were afraid of the decision, they appealed; and had not a title absolutely indefeasible, but as good a warranty as could be procured. The depart-

(5) Where the title rests on a presumption of fact of such a kind that if the question of fact were before a jury, it would be the duty of the judge not to give a clear direction in favor of the fact, but to leave the jury to draw their own conclusion from the evidence.

To this principle we may probably refer many of those cases where a doubt as to a fact has prevailed; as where the title depended upon proof that there was no creditor who could take advantage of an act of bankruptcy committed by the vendor;(*g*) or where the title depended upon the absence of notice of an incumbrance, of which absence the vendor produced some evidence,(*h*) or upon the presumption arising from mere possession.(*i*)

And it may be noticed that the court will not allow a voluntary settlor to force on an unwilling(*j*) purchaser a title depending on the invalidity of the settlement.(*k*) "One difficulty in the way of assisting him," said Lord Eldon, "is, that he has no equity to defeat the act which he has done himself; but another consideration which has weighed in such cases is, that if you compel a purchaser to take an estate at the instance of such a man, you cannot be quite sure that there may not have been some intermediate acts,

(*g*) Lowes v. Lush, 14 Ves., 547.
(*h*) Freer v. Hesse, 4 De G. M. & G., 495.
(*i*) Eyton v. Dicken, 4 Pri., 303.
(*j*) Peter v. Nicolls, L. R. 11 Eq., 391.
(*k*) Smith v. Garland, 3 Mer., 123; Burke v. Dawson, St. Leon. Vend., 492, Clarke v. Willott, L. R. 7 Ex., 313.

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ure from that course has been attended with great mischief. Whenever a contract is made for the purchase of land, though no doubt has ever been entertained upon the title, no one thinking of disputing it, if the purchaser has a good bargain, he overlooks all these objections; but if he finds he cannot sell the estate as well as he wished, or cannot enjoy it to his satisfaction, the first thing is that the abstract goes to some one for the express purpose of finding out objections, and opinions are given on both sides. I feel great concern for the owners of this sort of property. The consequence is, not only the misery arising from the uncertainty whether that which they have been enjoying with happiness, and upon which their families are to subsist, is their property; but it is an invitation to all who may fancy, that they have an interest in it, to make an attack. There cannot be much doubt, therefore, which is the best rule." See, also, Jervoise v. Duke Northumberland, 1 J. & W., 568. Battin on Specific Performances, page 117, says: "This anomaly in the practice of courts of equity, which refuse to decide whether the title is good or bad, and only decide that there is doubt about it, and which refuse to force the purchaser to take the title if there is a cloud upon it, incidentally arose from their considering that there was a remedy at law, and that the jurisdiction was, therefore, discretionary. But the doctrine seems now to be too well-established to allow us to confine its application to those cases where relief can be obtained at law. It is said that the court, knowing that its decision on the title could not bind anybody, would not force the purchaser to take a title which it could not warrant to him. But this obviously supposed an uncertainty as to the law, which ought, in a perfect system of jurisprudence, never to be presumed."

which, by matter *ex post facto*, may have made the settlement good which in its origin was not good."(*l*)

(6) Where the circumstances amount to presumptive (though not necessarily conclusive) evidence of a fact fatal to the title; as, *e. g.*, that the exercise of a power under which the vendor claimed was a fraud upon the power.(*m*.)

§ 871. On the contrary it is conceived that the court would consider the title not to be doubtful in any of the following cases, viz.:

(1) Where the probability of litigation ensuing against the purchaser in respect of the doubt is not great, the court, to use Lord Hardwicke's language in one case, "must govern itself by a moral certainty, for it is impossible, in the nature of things, there should be a mathematical certainty of a good title."(*n*) Accordingly, in the case before Lord Hardwicke, his lordship enforced specific performance, although there was a reservation of mines, because the court was satisfied that there was not subject matter for the reservation to act upon, or that all legal right to exercise it had ceased.(*o*) And in another case, Lord Romilly, M. R., forced on an unwilling purchaser a title depending on the validity of a purchase by a solicitor from his client, on proof of the validity of the transaction, though given in the absence of the client, who, it was urged, might possess other evidence and ultimately set aside the sale.(*p*)

(2) Where there has been a decision adverse to the title by an inferior court, which decision the superior court holds to be clearly wrong.(*q*)

(3) Where the question depends on the general law of the land. "As a general and almost universal rule, the court is bound as much between vendor and purchaser, as in every other case, to ascertain and so determine, as it best may, what the law is, and to take that to be the law which it has so ascertained and determined."(*r*)

(4) Where the question, though one of construction, turns

(*l*) In Johnson v. Legard, T. & R., 294. See, too, Clarke v. Willott, L. R. 7 Ex., 313. For an instance of a decree for specific performance, notwithstanding a previous voluntary grant, at the suit of a purchaser, see Rosher v. Williams, L. R. 20 Eq., 210.

(*m*) Warde v. Dixon, 28 L. J. Ch., 315; S. C., s. n., Warde v. Dickson, 7 W. R., 148.

(*n*) In Lyddall v. Weston, 2 Atk.

(*o*) See, as to this case, per Grant, M. R., in Seaman v. Vawdrey, 16 Ves., 393; Martin v. Cotter, 3 Jon. & L., 496.

(*p*) Spencer v. Topham, 22 Beav., 573. See, too, Falkner v. Equitable Reversionary Society, 4 Drew., 352.

(*q*) Supra, § 867.

(*r*) Per James, L. J., in Alexander v. Mills, L. R. 6 Ch., 131, 132; Forster v. Abraham, L. R. 17 Eq., 351; Osborne to Rowlett, 13 Ch. D., 774.

on a general rule of construction, unaffected by any special context in the instrument, and the court is in favor of the title.(*s*)

(5) Where the title depends on a presumption, provided it be such, that if the question were before a jury, it would be the duty of the judge to give a clear direction in favor of the fact, and not to leave the evidence generally to the consideration of the jury.(*t*) So where the recital of deeds raised the presumption that they contained nothing adverse to the title, the mere loss of the deed, where the title was fortified by sixty years' undisputed possession, was held not to create a reasonable doubt:(*u*) and so again, where the validity of a title depended on no execution having been taken out under certain judgments, between the 27th September, 1769, and the 23d May, 1770, and nothing was shown to have been done which could be referred to such an execution, the court considered the title good.(*v*) To this head may perhaps be referred the fact that the court will (except at the suit of the settlor[*w*]) compel specific performance of a title depending on the invalidity of a voluntary conveyance as against a purchaser for valuable consideration without notice,(*x*) the court, as it seems, acting on the presumption of the conveyance not having been rendered valid by subsequent dealings.[1]

(*s*) Radford v. Willis, L. R. 7 Ch., 7.
(*t*) Emery v. Grocock, 6 Mad., 54; Barnwell v. Harris, 1 Taunt, 430.
(*u*) Prosser v. Watts, 6 Mad., 59; Magennis v. Fallon, 2 Moll., 561.
(*v*) Causton v. Macklew, 2 Sim., 242.
(*w*) Supra, §§ 387, 448, 870.
(*x*) Butterfield v. Heath, 15 Beav., 408; Buckle v. Mitchell, 18 Ves., 100.

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[1] *Marketable title, specific performance.*] A court of equity will not decree specific performance, unless a marketable title can be given. It is not enough that a court might consider the title good. Swayne v. Lyon, 67 Pa. St., 436; Littlefield v. Finsby, 26 Texas, 353; Linkous v. Cooper, 2 W. Va., 67; Speakman v. Forepaugh, 44 Pa. St, 363; Freetley v. Barnhart, 51 Pa. St., 279; Butler v. O'Hare, 1 Dessau.'s Eq., 382; Thompson v. Dalles, 5 Rich. Eq., 370; Powell v. Conant, 33 Mich., 396. The rule is slightly qualified in Vreeland v. Blauvelt, 23 N. J. Eq., 483.

Construction of the words "good deed," or its equivalent.] A covenant to execute and deliver a good and sufficient deed, means an operative conveyance, or one that transfers a good and sufficient title to the land. Where the contract is to give a "good deed," or where equivalent words are used, it is not enough that a deed with proper warranty is executed in legal form. In order to satisfy the language, the deed must be good and sufficient to convey a title to the land, both in form and substance. Clute v. Robinson, 2 Johns., 413; Everston v. Kirkland, 4 Paige's Ch., 638; Burwell v, Jackson 9 N. Y., 535; Mead v. Fox, 6 Cush., 202; Mitchell v. Hagen, 4 Conn., 495; Taft v. Kessel, 16 Wis., 273; Morgan v. Smith, 11 Ill., 199; Tindell v. Conover, 1 Zab., 654; Jones v. Gardner, 10 Johns., 266; Judson v. Wass, 11 Johns., 528; Traver v. Holstead, 23

(6) Where the doubt raised rests not on proof or presumption, but on a suspicion of *mala fides*. This point has given rise to some diversity of opinion. In Hartley v. Smith,(*y*) the title depended on a deed of grant of chattels, containing a stipulation for the grantor's continuing conditionally in possession; and Leach, V. C., without deciding whether such a deed was in itself fraudulent and an act of bankruptcy, declined to force the title on the purchaser, on the ground that its validity depended on its being made upon good consideration and *bona fide*, and that these were circumstances, the existence of which the purchaser had no adequate means of ascertaining. "My opinion, therefore, is," said the vice-chancellor, "that a court of equity ought not to compel this purchaser to accept this title: because assuming the deed not to be fraudulent *ex facie*, it still may be avoided by circumstances extrinsic, which it is neither in the power of the purchasers or of this court to reach."(*z*)

(*y*) Buck, Bankr. C., 368

(*z*) P. 380. See, also, Boswell v. Mendham, 6 Mad., 373.

Ind., 66; Carpenter v. Bailey, 17 Ind., 244; Pomeroy v. Drury, 14 Barb., 424; Fletcher v. Button, 4 N. Y., 400; Story v. Conger, 36 N. Y., 673; Swan v. Drury, 22 Pick., 488; Gilchrist v. Bine, 1 Den. & Bart. Eq., 346; Little v. Paddleford, 13 N. Y., 167; Watts v. Waddle, 1 M'Lean, 200; Lawrence v. Dole, 11 Vt., 549; Greenwood v. Ligon, 10 Sm. & Marsh., 615; Dodd v. Seymour, 21 Conn., 480; Pugh v. Chesseldine, 11 Ohio, 109; Hunter v. O'Neil, 12 Ala., 37; Freemaster v. May, 13 Sm. & Marsh., 275; Cunningham v. Sharp, 11 Humph, 120; Dearth v. Williamson, 2 Searg. & Rawle, 498; Cowell v. Hamilton, 10 Watts, 415; Christian v. Cabell, 22 Gratt., 82; Tarwater v. Davis, 2 Eng. Ark., 153; Toll Bridge Co. v. Vreeland, 3 Green Ch., 132 *Contra.* Parker v. Parmlee, 20 John., 132, where it was held, that a covenant to convey "by a good warranty deed of conveyance" refers to the instrument, and not to the title, and is satisfied by the execution of a warranty deed. See, also, Gazeley v. Price, 16 John., 267; Barrow v. Bispham, 6 Halsh., 119; Brown v. Covilland, 6 Cal., 566; Tinney v. Ashley, 15 Pick., 552; Hill v. Hobert, 16 Me., 164. In Delavan v. Duncan, 49 N. Y., 487, the court says that Gazeley v. Price, and Parker v. Parmlee, were both overruled by the Court of Appeals (the highest court in New York) in Burwell v. Jackson, supra. "In this case it was distinctly held that a covenant to give a good and sufficient conveyance of land would be performed only by giving a deed that would vest in the grantee an unincumbered title to the premises." Brown v. Gannon, 14 John, 276 is an instructive case as explaining the words "the title to be a good and sufficient deed." In Vermont it has been held that where the grantor covenanted "to give a good and warranty deed," that this language did not refer to the title, but did refer to the instrument, and that the contract was not broken by the inability of the vendee to convey free of incubrance. Joslyn v. Taylor, 33 Vt., 470; Preston v. Whitcomb, 11 Vt., 47.

"*The title on investigation to be satisfactory*"] Where this language was used in a written contract for the sale of land, and the vendee gave notice that he was not satisfied with the title Held, that an agreement on the part of the vendee to perfect the title did not make the case one for specific performance. Taylor v. Williams, 45 Mo., 80; see, however, Lord v. Stephens, 1 Y. & C. Ex., 222.

§ **872**. This dictum seems to allow no room to the presumption of *bona fides*, and to make the possibility of fraud in extrinsic facts a sufficient objection to the title: accordingly, it has not been accepted in all its generality. It "must not," said Alderson B. of this dictum, "be pushed to the farthest extent which the words will possibly bear;"(*a*) and, accordingly, that judge held good a title under a deed which extrinsic evidence might have shown to be invalid, as comprising all the property of the grantor, or as made to give a fraudulent preference to some creditors over others, or as made in contemplation of bankruptcy, because there was no ground apparent for making any of these objections to it.(*b*)

§ **873**. In Green v. Pulsford(*c*) the vendor claimed under an appointment made by a husband and wife to their eldest daughter, under a settlement gave them successive life estates, with remainder to their children as they should appoint, and in default of appointment between such children: and the parents had incumbered their life interests, and, shortly after the appointment, they and their daughter executed a mortgage: these were circumstances which might create in every one's mind a suspicion that the appointment was a fraud on the settlement, and that was strengthened by a notice from a younger son to the purchaser not to complete, and that the appointment was such a fraud; but inasmuch as the notice alleged no facts, and gave no information not apparent on the abstract, and was not followed up by any proceedings, the court considered that the title was not open to any sufficient doubt, and forced it on the purchaser. In an earlier case, where there were somewhat similar grounds for suspecting the *bona fides* of an appointment, Lord Eldon pursued the same course, and enforced specific performance.(*d*)

§ **874**. In another case, the purchaser showed that the title was made under a sale by newly appointed trustees to a person who had previously bought the interest of the tenant for life, and who, eighteen months afterwards, made a

(*a*) 4 Y. & C. Ex., 236.
(*b*) Cattell v. Corrall, 4 Y. & C. Ex., 228.
(*c*) 2 Beav., 71.
(*d*) M'Queen v. Farquhar, 11 Ves., 467. See, also, Grove v. Bastard, 2 Ph., 619; S. C., 1 De G. M. & G., 69; and Re Huish's Charity, L. R. 10 Eq. 5.

profit on his purchase: but the court held these circumstances immaterial.(*e*)

§ **875**. Again, a purchaser is not entitled in the absence of circumstances of suspicion to refuse a title made under a will, because the will has not been proved against the heir or he does not join:(*f*) so that where, during a litigation of thirteen years, no question had been raised impeaching the validity of the will, and a person who had claimed under another will had withdrawn from all contention against the one first mentioned, Lord Hatherley (then Wood, V. C.) compelled the purchaser to take a title under the will.(*g*)[1]

§ **876**. Where the court comes to the conclusion that a good title can be made it generally orders the purchaser to pay the costs of the litigation, so as to assure his title and show that the court entertains no doubt upon it.(*h*)

§ **877**. Recent legislation affords machinery under which, in some cases at least, the person making an adverse claim may be brought into the litigation, and that, which in his absence might have remained doubtful, may receive judicial determination. It seems worthy of consideration whether this principle could not be further extended.[2]

§ **878**. By the land transfer act, 1875 (38 and 39 Vict., c. 87), s. 93, it is enacted that "where a suit is instituted for the specific performance of a contract relating to registered land or a registered charge, the court having cognizance of such suit may by summons, or by such other mode as it deems expedient, cause all or any parties who have registered estates or rights in such land or charge, or have entered up notices, cautions, or inhibitions against the same, to appear in such suit and show cause why such con-

(*e*) Alexander v. Mills, L. R. 6 Ch., 124.
(*f*) Colton v. Wilson, 3 P. Wms., 190; per Lord Eldon in Morrison v. Arnold, 19 Ves., 670; Weddall v. Nixon, 17 Beav., 160.
(*g*) M'Culloch v. Gregory, 3 K. & J., 12.
(*h*) Per Jessel, M. R., in Osborne to Rowlett, 13 Ch. D., 798; cf. Nicholls v. Corbett, 34 Beav., 381, 382. Hood v. Lord Barrington, L. R. 6 Eq., 221. Woods v. Hyde, 10 W. R., 310. In Radford v. Willis, L. R. 7 Ch. 7, the purchaser was "excused" from paying costs.

[1] See to this effect, the case of Butler v. O'Hear, 1 Dessau., 382.

[2] But a title may be doubtful, because it depends on a doubtful interpretation of a will, if all parties who may be interested in the estate are not bound by the decree, and therefore will not be forced upon a purchaser. Sohier v. Williams, 1 Curtis' C. C. Rep. 479.

Where will presents difficult questions of construction as to title it is matter of discretion with court as to whether it will compel specific performance of a contract for sale of land. Kelso v. Loullard, 85 N. Y., 177.

tract should not be specifically performed, and the court may direct that any order made in such suit shall be binding on such parties or any of them."(*i*)

§ **879**. Again, by the rules of the Supreme Court, where it appears to the court or a judge that a question in the action should be determined, not only as between the plaintiff and defendant, but as between the plaintiff, defendant, and any other person, or between any or either of them, the court or a judge may, on notice being given to such last-mentioned person, make such order as may be proper for having the question so determined.(*j*)

§ **880**. In a case where parties stated facts in the form of a special case, and required the opinion of the court whether on these facts a good title was shown, the court declined to consider the question of the title being doubtful: it confined itself to the question asked, whether or no a good title was shown.(*k*)[1]

(*i*) See infra, § 1110.
(*j*) Ord. XVI, r. 17. See, too, Rules 17, 21, of the same Order, supra, § 168
(*k*) Governors for Relief of Poor Widows of Clergymen, etc., v. Sutton, 27 Beav., 651, a case under Sir Geo. Turner's Act (13 and 14 Vict., c. 35), ss. 2, 18 the procedure under which has been superseded by that under Ord. XXXIV (see especially rule 7).

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[1] *In a case where the title is suspicious, extrinsic circumstances.*] Equity will not decree specific judgment against a purchaser in a case where although there is no proof of fraud, yet there are instances connected with the title which would give a prudent man cause for suspicion, and the good or bad faith of the transaction depends upon extrinsic circumstances. In Hartley v. Smith, Buck's Banks Cas., 368, the vice-chancellor, said. "My opinion, therefore, is, that a court of equity ought not to compel the purchaser to accept this title; because assuming the deed not to be fraudulent *ex-facie*, it still may be avoided by circumstances extrinsic, which it is neither in the power of the purchaser or of this court to reach."

After possession has been occupied by the vendee.] Both courts of law and equity where the transaction is free from fraud, apply the maxim *caveat emptor* to contracts of purchase of real as well as of personal property, a purchaser may in general, rely on old deeds, as to location and boundery. Welsh v. Hall, 66 N C., 233. Where the contract is executory, if the vendor has no title the vendee may have a rescission; but if the agreement has been extended, in order that a court of equity may grant relief to the purchaser, or restrain the collection of the purchase money, eviction or fraud must be averred and proved. Patton v. Taylor, 7 How., 133; Campbell v. Medbury, 5 Bissell, 33. The vendee of land in possession, sought to resist the payment of the purchase money, on the ground that his vendor could not make a good title; the paramount title being in a third party. Held, that he must show affirmatively the existence of such paramount title, and that the evidence must be clear and satisfactory. Cantrel v. Mobb, 63 Ga., 193; Sawyer v. Sledge, 55 Ga , 152.

Incumbrances existing against real property sold.] Where real property has been sold free from incumbrances, a purchaser need not receive his deed, and pay his money while incumbrances exist against the property. A court of equity will not compel him to rely on the personal responsibility of the vendor, but will suspend the payments of the purchase money until the incumbrances are removed, if this is not done after a reasonable time the contract will be re-

scinded. Bishop v Newton, 20 Ill., 175; Rindley v. Gray, 6 Ired.'s Eq., 445; Shaw v. Vincent, 64 N. C., 690; Wallace v. McLaughlin, 57 Ill., 53. In Davidson v. Perrine, 22 N. J. Eq., 87, where the vendor filed a bill for specific performance, that the vendee should elect either to accept such a title as the vendor was able to convey, or abandon the contract, and restore the possession

Time within which the vendor must be prepared to make a good title] In order that a vendor may be in a position to envoke the aid of equity in enforcing specific performance of a contract of sale of real property, he must show that in good faith, and without unnecessary delay he has performed all the obligations which devolved upon him; or that he is ready and in a position to do so. King v. Hamilton, 4 Pet., 311; Seymour v. Delanc y. 6 Johns., Ch., 222; Grundy v. Ford, Litt Sel. Cas., 129; Barnett v. Higgins, 4 Dana, 565. A reasonable dilligence must be exercised by the vendee in ascertaining the state of the title. Havens v. Bliss, 26 N. J. Eq., 363 The vendor will not be deprived of his right to enforce the contract specifically, by mere delay, unless it be shown that such delay has been unreasonable and without excuse; and it is out of the power of the court to place the respective parties in the same position they would have occupied had the contract been carried out before. McKay v. Carrington, 1 McLean, 50; Cooper v. Brown, 2 McLean, 495; Snyder v. Spaulding, 57 Ill., 480. It appears to be the well settled rule that the vendor of real estate has a right to a decree of specific performance, in cases where time is not of the essence of the original contract, without showing that the title is actually in him at the time of the conveyance. If he is able to give a good title at the time of the decree, it is usually sufficient. In Layford v Pitt, 2 P. Wms , 629, it was said *per curiam*, "It is sufficient if the party entering into articles to sell has a good title at the time of the decree; the direction of the court being in all these cases to inquire whether the seller *can*, not whether he *could*, make a title at the time of executing the agreement In the case of Lord Stowton v. Sir Thomas Meers, the Lord Stowton, at the time of the articles for a sale, or even when the decree was pronounced, could not make a title, the reversion in fee being in the crown. And yet the court indulged him with time more than once for the getting in of this title from the crown, which could not be effected without an act of Parliament to be obtained in the following session. However, it was at length procured and Sir Thomas Meers decreed to be the purchaser. Indeed it would be attended with great inconveniences, were decrees to direct an inquiry whether the contractor to sell had, at the time of entering into such contract, a title; for this all encumbrances, and defects must be raked into. Wherefore, it has been thought sufficient to answer the end, if, at the time of the decree or report the seller can make a good title " See, also, Hepburn v. Auld, 5 Cranch, 262; Wilson v. Tappan, 6 Ohio, 172; Mays v. Swope, 8 Gratt., 74; Allerton v. Johnson, 3 Sandf. Ch., 72; Dubose v. James, McMullan Eq., 55; Hepburn v. Dunlop, 1 Wheat., 179; Seymour v. Delaney, 3 Conn., 445; Cotton v. Ward, 3 Monr., 305; Westall v. Austin, 5 Ired.'s Eq., 1; Brown v. Haff, 5 Paige's Ch , 235; Luckett v. Williamson, 37 Mo., 388; Moss v. Hanson, 17 Pa. St., 370; Musselman's App., 65 Pa St., 480; Winne v. Reynolds, 6 Paige's Ch., 407; Jenkins v. Fahey, 73 N. Y , 355. In Rutland v Brister, 53 Miss., 683, it was held, that a party could contract to convey land, he having at the time no title either legal or equitable in it; and that his obligation was fulfilled if when the time for performance arrived, he induced the real holder of the title to convey to the vendee.

Inability to obtain title, good defense] An action was brought for specific performance of a contract to convey land. The vendor was unable to convey by reason of want of title. Held, a good defense, after reasonable efforts to obtain title. Swepson v Johnson, 81 N. C., 449.

CHAPTER XIX.

OF FAILURE OF THE CONSIDERATION.

§ 881. It will be necessary to inquire under what circumstances events which either determine the existence of the subject-matter of the contract, or essentially affect it, will furnish a defense in specific performance. Events affecting the subject matter, but not essentially, may give rise to a claim for compensation, but will not prevent performance of the contract.[1]

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[1] *Vendor should inspect property.*] A purchaser had an opportunity, and was urged to inspect the property, but neglected to do so; there was no fraud in the transaction. Held, that he should not be relieved from his purchase by reason of the partial failure of consideration. Vincent v. Berry, 46 Iowa, 571.

Personal property, failure of consideration.] The rule is, not only that there is such property, but that it is really in the form, and is of the description stated in the agreement. Morrill v. Aden, 19 Vt., 505; Butman v. Porter, 100 Mass., 337.

Property sold by order of the court.] In such a case, the question frequently to be determined is whether the agreement is concluded by the sale, subject to defeat if the same is opened, in which case the agreement will relate back to the day of sale; or whether the contract is not concluded until it becomes obsolute by having been confirmed by the court. The rule appears to be, that the first review is sustained by the weight of authority. Vesey v. Elwood, 3 Dr. & W., 74; Anson v. Towgood, 1 J. & W., 637; Robertson v. Spelton, 12 Beav., 260; See, also, Busey v. Hardin, 2 B. Mon., 407; Owen v. Owen, 5 Humph., 352; Robb v. Mann, 1 Pa. St., 300, is an instructive case in this connection. See, as well, Stoner v. Rice, 3 Whart., 25; Bashaw v. Whisler, 3 Watts, 494; Morrison v. Wurtz, 7 Watts, 437; Bellas v. McCarthy, 10 Watts, 22; Andrews v. Scottan, 2 Bland Ch. (Md.), 629.

Inability to fulfill at time agreed upon.] Where an agreement to purchase is to be completed at a definite period, and the title is finally made out, the parties to the same continuing in treaty and the party purchasing not by any acts released from his agreement, it is the rule that the estate belongs to the purchaser, from the date of the contract, and the money to the party who sells. The completion of title must not be unreasonably delayed by the vendor. Brewer v. Herbert, 30 Md., 302; Griffin v. Cunningham, 19 Gratt., 571. Where the house was consumed by fire before titles was perfected, held, that specific performance would not be decreed. Christian v. Cabell, 22 Gratt., 82.

Unexcused delay in payment.] Where this is the fact, and a material change of circumstances have transpired, which makes the contract more onerous, equity will not decree its specific performance. Andrews v. Bell, 56 Pa. St., 343; Bouton v. Sheffer, 21 Gratt., 474; Menet v. Brown, 19 N. J. Eq. (4 Green), 286.

Conditional contract. Rule.] The condition must be performed, before the contract becomes absolute. The property is at the risk of the vendor, until that is the fact. Penfield v. Penfield, 41 Conn., 474; Jaycox v. Clark, Walk. (Mich.) Ch., 508; Davis v. Bowker, 1 Nevada, 487; Counter v. Macpherson, 5 Moo. P. C. C., 83.

1. *Events prior to the contract.*

§ **882**. Events may happen before the conclusion of a contract, which may either (1) determine the existence of its subject matter, or (2) materially affect such subject matter. The former class of events do not, properly speaking, avoid the contract, but prevent its ever arising, on the ground of the common mistake; the latter class of events give the party injuriously affected a right to avoid the contract.(*a*)

§ **883**. In one case, the contract was for the sale of an estate in fee in remainder on an estate tail: a conveyance had been executed and a bond given for payment of the purchase money, when it was discovered, for the first time, that at the time of the sale no such remainder existed, the tenant in tail having previously suffered a recovery; the court rescinded the contract, and ordered the bond to be delivered up and repayment to be made of all interest which had been paid on it.(*b*)[1]

§ **884**. In another case, where, in order to preserve the timber on an entailed estate from being cut down by the assignee in the insolvency of a tenant for life, the owner of the next life estate and the tenant in tail contracted with the assignee that he should be deemed to be entitled to the timber, as if it had been cut down and carried away by him

(*a*) Consider Prichard v. Merchants', etc., Life Assurance Society, 3 C. B., N. S., 622. (*b*) Hitchcock v. Giddings, 4 Pri., 135.

[1] It is well settled that a contract may be avoided for failure of consideration; but it must be a total one, or at least total as to distinct parts of the contract; the object of the agreement must be defeated or rendered unattainable by the default. Morrill v. Aden, 19 Vt. (4 Washb.), 505; Baker v. Thompson, 16 Ohio, 504; Selby v. Hutchinson, 4 Gilm., 319; Jacox v. Clark, Walk. Ch., 508, is a case analogous in principle with Hitchcock v. Giddings, cited in the text. The defendant, there, received the grant of the right to use certain water power, and dig a race on complainant's land, in consideration of erecting a mill at a certain place where their lands joined. But the defendant, having diverted the water from the complainant's land, built his mill at another place. It was held that the consideration had failed, and the complainant was entitled to a reconveyance; and further that the defendant should be enjoined from setting up his deed in defense in any action for a previous diversion of the water. At law, a failure of consideration in cases of contract, is constantly treated as a sufficient ground for considering the contract as rescinded and maintaining an action for money had and received. Cloherty v. Creek, 3 Har. & J., 328; Eames v. Savage, 14 Mass., 425; Lyon v. Annable, 4 Conn., 350; Gillet v. Maynard 5 John., 85; Raymond v. Bearnard, 12 id., 274; Wheeler v. Board, Id., 363; Davis v. Marston, 5 Mass., 199; Danforth v. Dewey, 3 N. H. 79; Spring v. Coffin, 10 Mass., 31; Lacoste v. Flotard, 1 Rep. Con. Ct., 467; Wharton v. O'Hara, 2 N. & M., 65; Duncan v. Bell, Id., 153; Pettibone v. Roberts, 2 Root, 258; Boyd v. Anderson, 1 Overt., 438; Putnam v. Westcott, 19 John., 73.

on a specified day prior to the contract, but should not actually cut it before another specified day; and at the time when this contract was made, the insolvent was dead, but no party to the contract was aware of that fact; the court of appeal declined on the grounds of mistake and absence of consideration, to enforce the contract.(*c*)

§ **885**. Again, where a contract for the sale and purchase of shares in a company was entered into at a time when, in fact, though neither vendors nor purchaser knew it, a petition for winding up the company had been presented, the court of appeal refused to enforce the contract.(*d*)

§ **886**. A contract relating to a chattel implies, at common law, the existence of the chattel and its existence in the form or of the description specified in the contract, and consequently an event destroying the chattel before the contract is concluded puts an end to it. Therefore, where a contract for the sale of a life annuity was concluded in England on the 28th of February, and the annuitant died in New South Wales on the 6th of the same month, there was held to be no contract;(*e*) and where a floating cargo was sold, and it subsequently appeared that, at the time of the sale, the captain had sold the cargo abroad, in consequence of the damage it had sustained at sea, the exchequer chamber and the House of Lords held the contract to be incapable of being enforced.(*f*)[1] But no warranty being implied at common law as to condition, the sale of a ship at sea, which at the time happened to have been stranded, was held binding, for the subject of the contract still continued a ship.(*g*) The impossibility of performing a contract of which the subject matter is extinct would, of course, prevent the interference of a court of equity in these cases, if, on other grounds, it could give relief.(*h*)

(*c*) Cochrane v Willis, L. R. 1 Ch., 58.
(*d*) Emmerson's Case, L. R. 1 Ch., 433, reversing the order of Lord Romilly, M. R., L. R. 2 Eq., 231.
(*e*) Strickland v. Turner, 7 Exch., 208; cf. Cochrane v. Willis, L. R. 1 Ch., 58.
(*f*) Couturier v. Hastie, 8 Ex., 40; reversed in Cam. Scac., 9 Ex., 102; the reversal affirmed 5 H. L. C., 673
(*g*) Barr v Gibson, 3 M. & W., 390.
(*h*) See infra, § 969.

[1] The same doctrine obtains at law. Dickson v. Cunningham, Mart. & Yerg., 203. In that case, the defendant was indebted to *A.*, who was indebted to *B.*, who was indebted to the plaintiff; they all met together, and the defendant aided *A.* in successfully assigning to the plaintiff a debt which belonged to neither; and, by this means, *A.* paid his debt to *B.* and *B.* paid his debt to the plaintiff, and *A.* credited the defendant. Held, that the plaintiff might disaffirm the contract, and maintain an action of assumpsit against the defendant.

§ **887**. But a person may so contract as to preclude himself from raising any question as to the existence or determination of the subject matter at the time of the contract.(*i*)

§ **888**. The question of the time at which the contract became complete, frequently arose in cases of sales by the court of chancery, because until the report had been confirmed absolute, or, according to the subsequent practice, until eight days after the certificate of the purchase had been signed by the judge in chambers, the biddings might be re-opened.(*j*) In these cases, the question was, whether the contract was to be treated as concluded by the sale before the master or the chief clerk, subject only to being defeated by the opening of the biddings, in which case the confirmation related back to the day of sale, and that day divided events prior and events subsequent to the contract; or, on the other hand, whether the contract was to be considered concluded only when it became absolute and indefeasible by the confirmation. In the case of Vesey v. Elwood,(*k*) Lord St. Leonards decided on the former of these views, that the sale transferred the property, subject only to the risk of its being opened. This was the view of Lord Eldon also, in Anson v. Towgood,(*l*) though it seems at variance with the previous cases(*m*) before him. The other view was supported by the statement of Lord Langdale, M. R.: "By the established rule of the court, the purchaser is to be considered as the owner of the estate from the date of the order confirming the report;"(*n*) but as the circumstance which in this case gave rise to the question was not only after the sale but after the confirmation also, the case is probably not of the same weight on the point now under discussion, as if the circumstance had been after sale but before confirmation.[1]

(*i*) Hanks v. Pulling, 25 L. J. Q. B., 375; S. C. (s. n. Hanks v. Pulling) 4 W. R., 607. See infra, § 1288.
(*j*) 15 and 16 Vict., c. 80, s. 34.
(*k*) 3 Dr. & War., 74.
(*l*) 1 J. & W., 637.
(*m*) Ex parte Minor, 11 Ves., 559 (which may, perhaps, be supported by the general power of the court in dealing with such contracts). Twigg v. Fifield, 13 Ves., 517.
(*n*) Robertson v. Skelton, 12 Beav., 260, 265; cf. Paramore v. Greenslade, 1 Sm. & G., 541.

[1] In Kentucky, it is clearly the rule that the highest bidder at a sale, under a decree, is held only as a preferred bidder, subject to confirmation by the chancellor. Busey v. Hardin, 2 B. Monr. 407. And it would seem that the same doctrine is adopted in Tennessee. Owen v. Owen, 5 Humph., 352. In Maryland the practice of opening biddings does not prevail. Andrews v. Scotten, 2 Bland, 629.

§ **889**. But the former practice of opening biddings has now been discontinued by statute, and it has been enacted that the highest *bona fide* bidder at the sale, provided he shall have bid a sum equal to or higher than the reserved price (if any), shall be declared and allowed the purchaser, unless the court or judge shall, on the ground of fraud or improper conduct in the management of the sale, upon the application of a person interested in the land (such application to be made to the court or judge before the chief clerk's certificate of the result of the sale shall have become binding), either open the biddings, holding such bidder bound by his bidding, or discharge him from being the purchaser.(*o*) Under this enactment it seems clear that the purchase is complete when the sale at or above the reserve price, if any, has taken place.(*p*)

2. *Events to the contract.*

§ **890**. Events subsequent to the contract will, in some cases, furnish a defense to an action for specific performance; in other cases they will not.

§ **891**. Where, from the nature of the contract, it appears that the contracting parties contemplated its fulfillment only in the event of the continued existence of some subject matter or thing, the contract is held to be subject to an implied condition that it shall cease with the subject matter or thing; and if, before performance, the thing cease to exist, the contract goes with it.(*q*).

§ **892**. In the case of contracts for the sale of land, it has been laid down with regard to events happening after their being signed, that the question on whom the advantage or loss resulting from them would fall, and whether, therefore, the court would enforce specific performance without reference to them—or whether, on the other hand, they might determine the contract—is to be decided by whether or not the title had then been actually accepted.(*r*) But the more correct doctrine appears to be that the equitable estate passes on the signature of the contract if there be a good title, though that may not be shown till after-

(*o*) 30 & 31 Vict. c. 48, s. 7.
(*p*) Cf. Re Bartlett, 16 Ch. D., 561.
(*q*) Taylor v. Caldwell, 3 Best & S., 826; Howell v. Coupland, 1 Q. B. D., 258.
(*r*) Wyvill v. Bishop of Exeter, 1 Pri., 292, 295 n.; and see Paine v. Meller, 6 Ves., 349.

wards. "It is," said Plumer, V. C., "the established doctrine of equity, that if a contract to purchase is to be completed at a given period, and the title is *finally made out*, the parties continuing in treaty, and the purchaser not by any acts released from his bargain, the estate is considered as belonging to the purchaser from the date of the contract, and the money from that time as belonging to the vendor."(*s*)[1]

§ **893**. Where the contract is in its inception expressly conditional, the transfer of the equitable estate from the vendor to the purchaser takes place not on the conclusion of the contract, but on its becoming absolute by the performance of the condition, and until that event the property sold remains at the risk of the vendor. This is well illustrated by a case which was decided by the judicial committee of the privy council, on appeal from the court of chancery in Canada. A contract was entered into for a lease for five years, from the 1st of April, 1840, the landlord undertaking to erect by that time a new warehouse on part of the ground to be demised, and to put the old warehouse in repair, the amount of rent to be determined with reference to the amount expended on the buildings. The new building was not completed, nor the old warehouse repaired, on the 1st of April, but no objection was made by the intended lessees, who then continued to occupy part of the premises under a former contract. Shortly afterwards, the whole premises were destroyed by fire. The landlord brought a bill for specific performance of the contract, and for the defendants to rebuild the premises and accept a lease. It was held, in the first place, that if time were of the

(*s*) In Harford v. Purrier, 1 Mad., 538. See too infra, § 1365 et seq.

[1] If a defendant is able to make a perfect title at the time of the decree, the plaintiff's rights under his contract of purchase are as thoroughly protected, and his objects as successfully attained, in the views of a court of equity, as though title had been given on the day of the contract. The right of a purchaser, in these cases, is clearly a fixed and determinate one. So much so that where there is a contract for the purchase of land, and the person contracting to sell declines executing the contract, upon the ground that he is unable to give a good title, and the purchaser files his bill to compel the defendant to complete his contract, or rescind it, if the defendant is able to give a good title at the time of the decree, the complainant will be compelled to accept it. Pierce v. Nichols, 1 Paige, 244; Baldwin v. Salter, 8 id., 473; 7 id., 78; Seymour v. Delancey, 3 Cowen, 446. In the cases of chattels the rule is different. Seymour v. Delancey, 3 Cowen, 535.

essence, it had been waived by the defendants, but that this did not waive the obligation on the leesor as to building, and that the defendants were not bound to accept a lease till that was performed; and, in the second place, that, treating the contract to take a lease as a contract to purchase, the warehouse was never purchased by the lessees until it was completed by the lessor; and, consequently, that until that was done it was not the property of the lessees, nor at their risk.(*t*)[1]

§ **894.** In the case of a contract legal at the time it was entered into, but subsequently and before judgment rendered illegal by statute, it seems to be clear on principle that no specific performance could be granted except where the court could still execute the contract *cy pres*:(*u*) a contract thus rendered illegal would in the contemplation of the court have become impossible.(*v*)[2]

§ **895.** But when the contract has been completely made, the thing sold is at the risk of the purchaser, who must bear

(*t*) Counter v. Macpherson, 5 Moo. P. C. C., 83.
(*u*) See infra, § 979 et seq.
(*v*) Atkinson v. Ritchie, 10 East, 530, 534; Barber v. Hodgson, 3 M. & S., 267; Esposito v. Bowden, 4 El. & Bl., 963. See also Winnington v. Briscoe, 8 Mod., 51, and supra, § 456

[1] Personal property is, equally with real estate, the subject of conditinal sale; and possession is to be construed only as *prima facie* evidence of ownership. Mount v. Harris, 1 S. & M., 185. Where a slave was delivered under an agreement that the person taking her should return her or pay a certain price for her in a given time, it was held to be a conditional sale, and that the slave was not subject to the vendee's debts, while the condition was not performed. Id. Where a slave is delivered under an agreement of sale, at a fixed price, to be paid at a day certain, but, until paid, the legal title to remain in the vendor, the title of the buyer does not become absolute until the payment of the purchase money, nor does it become liable for his debts until then. Gambling v. Reed, Meigs, 281. But in such a case, the seller holds the legal title only as security for the purchase money, and if the buyer conveys the slave to a trustee to secure a debt, equity will not order the slave to be given up absolutely at the suit of the seller, but a short time will be given to the defendants to pay the purchase money and keep the slave. Id. In the conditional sale of a slave, the property is at the risk of the vendee. Prether v. Norfleet, 1 A. K. Marsh., 178. A condition may, however, be waived by subsequent acts. So, where goods are sold and delivered on condition that the purchaser gives his own notes on time therefor, endorsed by a third person, which he fails to perform, and the seller then takes the purchaser's own notes, for the price, on demand, with warrant of attorney to confess judgment thereon, this is a waiver of the condition, and an affirmance of the sale. Saunders v. Turbeville, 2 Humph., 272.

[2] *Contract separable, part illegal.*] A contract is void, where a part only of the same is illegal. The rule is otherwise, in a case where the consideration is legal, and some of the stipulations which can be separated, are illegal. Featherstone v. Hutchinson, Cro. Eliz., 199; Schackell v. Cosier, 3 Scott., 59; Crawford v. Monell, 8 Johns., 253; Donnalen v. Lenox, 6 Dana, 91; Woodruff v. Henniman, 11 Vt., 592; Leavitt v. Palmer, 3 N. Y., 19.

all subsequent losses, and is entitled to all subsequent gains:(*w*) subsequent events, therefore can neither determine the contract nor give either party a right to resist its performance.

§ **896**. Formerly this principle does not appear to have been as clearly recognized as it is now: thus, where a great subsequent advantage accrued to one party, Lord Hardwicke seems to have doubted how far the court would decree performance on the original terms of the contract.(*y*) And where A. contracted to sell his estate for an annuity during his life, the time appointed for conveyance was the 31st of October, but the annuity was to commence from the 5th of April previous, and to be paid half-yearly: the half-year's payment, due on the 5th of October, was not paid or tendered, and on the 12th of November A. died from an accident: Lord Bathurst and the House of Lords dismissed a bill for specific performance.(*z*) Lord St. Leonards(*a*) attributes this decision to the neglect to make or tender the payment; but it does not seem clear that the case was not considered by the judges who decided it as one of inadequate consideration, and treated as a case of hardship.

§ **897**. The principle as now established is illustrated by numerous cases. Thus, where money was left to be laid out in land to be settled to the use of A. in tail, remainder to B. in fee, and A. and B. agreed to divide the money, and before the contract had been carried into execution A. died without issue, the contract was nevertheless specifically performed.(*b*) So a contract to sell for an annuity will not be avoided by the death of the annuitant, even before any payment.(*c*) So where, subsequently to the contract for the sale of a house, the house is burnt down, the loss falls on the purchaser:(*d*) and in such an event the purchaser will not, in the absence of part of any provision in the contract, be entitled to the benefit of an existing insurance against fire effected by the vendor.(*e*) And again, where a trader

(*w*) Instit. l. iii., tit. 24, sec. 3; Porthier, Tr. du Contrat de Vente, Part IV.
(*x*) Per Lord Manners in Revel v. Hussey, 2 Ball & B. 287.
(*y*) Davy v. Barber, 2 Atk., 489. See also Stent v. Bailis. 2 P. Wms., 217.
(*z*) Pope v. Roots, 1 Bro. P. C., 370.
(*a*) Vend., 244.
(*b*) Carter v. Carter, Forrest, 271.
(*c*) Mortimer v. Capper, 1 Bro. C. C., 156; Jackson v. Lever, 3 Bro. C. C., 605.
(*d*) Paine v. Meller, 6 Ves., 349. In Cass v. Ruddle, 2 Vern., 280, the earthquake which destroyed the houses appears to have taken place after the contract had been carried into effect. See Raithby's note on case, and 1 Aro. C. C., 156 n.
(*e*) Poole v. Adams, 12 W. R. 683; Rayner Preston, 14 Ch. D. 297, affirmed in C. A. 25 Sol. Jo. 448; cf. Edwards v. West. 7 Ch. D. 858, and distinguish Reynard v. Arnold, L. R. 10 Ch. 386.

agreed to take two persons into partnership for a period of eighteen years, in consideration of a sum to be paid by instalments, and before they were all paid he became a bankrupt, the assignees were held entitled to the remaining instalments.(*f*)

§ **898**. Another class of cases which have illustrated the same principle has arisen from the failure or winding-up of a company after a contract has been entered into for the purchase of shares into it, but before the contract has been completed. Such an event furnishes no defence to an action for specific performance of the contract to buy the shares.(*g*)

§ **899**. Where a contract, capable of being specifically executed at the time of the issuing of the writ, has by lapse of time between that and the trial become incapable of execution in the ordinary way, so as to confer future benefits, the question arises, what course ought to be pursued. This question came before Plumer, M.R., in Nesbitt v. Meyer,(*h*) where a bill was filed before the term expired for a specific performance of a contract to accept a lease, but, without fault on either side, the term expired before the hearing. The case was decided upon another point, but the judge evidently inclined to the opinion, that the court would not decree the execution of a formal lease after the expiration of the term. In accordance with this view, Lord Cranworth expressed the opinion that it would require very special circumstances indeed to induce the court to decree specific performance of a lease after the expiration of the term.(*i*) "What the court," said his Lordship,(*j*) "really would be decreeing in such case would not be the specific performance for an agreement for a lease, but merely that the lessee should make himself a specialty debtor in respect of past benefits received." It is, however, to be remarked, that the circumstances of the case before Plumer, M. R., and before his Lordship were different, inasmuch as in the former the delay seems to have been entirely due to the

(*f*) Akhurst v. Jackson, 1 Sw. 85. See also Lord Eldon in Coles v. Trecothick, 9 Ves. 246.

(*g*) Paine v. Hutchinson, L. R. 3 Eq. 257; 3 Ch. 388; Cole v. Bristowe, L. R. 6 Eq. 149, 159 (reversed on a different ground, L. R. 4 Ch. 3); Hawkins v. Maltby, L. R. 4 Eq. 572; 3 Ch. 188; 6 Eq. 505; 4 Ch. 200; Chapman v. Shepherd, L. R. 2 C. P. 228; Taylor v. Stray, 2 C. B. N. S. 175; Stray v. Russell, 1 El. & El. 888.

(*h*) 1 Sw. 223.

(*i*) Walters v. Northern Coal Mining Co., 5 De G. M. & G., 629.

(*j*) 5 De G. M. & G. at p. 639. See, also, Hoyle v. Livesey, 1 Mer., 381, and De Brassac v. Martyn (11 W. R., 1020), where the court intimated that the plaintiff's proper course would have been to apply to have the case advanced so as to be heard before the expiration of the term.

court; whereas in the latter no steps were taken until just before the expiration of the term, so that it was impossible for the plaintiff to obtain a decree until the term was at an end.(*k*)

§ **900**. On the other hand, the opinion of Alderson B. was somewhat at variance with the doctrine above stated. "The moment the bill is filed," said his Lordship,(*l*) "the rights of the parties remain fixed, or ought so to do. I cannot accede to the doctrine in Nesbitt v. Meyer.(*m*) How can the constitution of the court alter the rights of the parties?" The decision in the case in the Exchequer seems, however, reconcilable with those before stated; for the prayer of the bill was for the specific performance of a contract for a lease, and for an account of arrears of rent on the footing of the contract, and it was held that although by the expiration of the term before the hearing the specific performance could not be granted, yet that the plaintiff was entitled to a decree for an account.

§ **901**. And similarly, in a previous case, Leach V. C. held that a bill might be maintained by a purchaser for the specific performance of a contract for a life annuity, although the annuitant had died not only before the hearing, but before the bill was filed, where there were arrears of the annuity between the time of the purchase and the death of the annuitant, to which the purchaser had an equitable title under the contract: but his Honor said that it might be a question whether such a bill could be maintained if the death of the annuitant were to happen so that the purchaser took no benefit under his contract, as might happen where his title was to commence at a future time.(*n*)

§ **902**. These cases perhaps left the exact state of the law on this point somewhat difficult to state. But now that both legal and equitable remedies may be obtained in one proceeding, and every prudent plaintiff will ask for both, the point appears of little practical importance.[1]

(*k*) Cf. Anon v. White, 3 Sw., 108 n., where, before the lease contracted for was executed, events rendered the intended subject-matter of the lease useless to the intended lessee; and the court directed only a quantum damnificavit.

(*l*) Wilkinson v. Torkington, 2 Y. & C. Ex. 726, 728.

(*m*) 1 Sw., 223.

(*n*) Kenney v. Wexham, 6 Mad., 355. See Strickland v. Turner, 7 Ex., 208.

[1] *Sale of real property by an administrator.*] When an administrator sells the land of his intestate, this is a judicial sale, and a proceeding *in rem*, the doct-

rine of *caveat emptor* applies. The vendee takes at his peril, and he must pay the agreed price even though he gets no title, where there is no proof of fraud, mistake, or concealment of material facts. Burns v. Hamilton, 33 Ala., 210; Garrett v. Lynch, 45 Ala., 204.

Real property conveyed without warranty.] In such a case, where there has been no concealment of material facts, and no fraud, no part of the purchase money can be recovered back either at law or in equity, in a case where the title proves defective. Botsford v. Williams, 75 Ill., 132. The vendee of real property was fully informed of the nature of the title which he purchased. In an action to recover the purchase money, it was held, that he could not wait the determination of an action of eviction against him. Boisblanc v. Markey, 21 La. An., 21.

CHAPTER XX.

OF DEFAULT ON PART OF THE PLAINTIFF.

§ 903. With regard to the matters to be done by the plaintiff according to the terms of the contract, it is, from obvious principles of justice, incumbent on him, when he seeks the performance of the contract, to show, first that he has performed, or been ready and willing to perform, the terms of the contract on his part to be then performed;(*a*) and secondly, that he is ready and willing to do all matters and things on his part thereafter to be done; and a default on his part in either of these respects furnishes a ground upon which the action may be resisted.(*b*)[1] We will first consider cases of default in respect of terms of the contract which ought to have been already performed.[2]

(*a*) 2 Eq. Cas. Abr., 33. See, also, the language of Lord Hardwicke and Gilbert C. B., cited infra, §§ 925-927; and cf. Ghillis v. McGhee, 13 Ir Ch. R., 48.

(*b*) See infra, § 915; Walker v. Jeffreys, 1 Ha., 341.

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[1] McNeil v. Magee, 5 Mason, 244; Longworth v. Taylor, 1 McLean, 395; Colson v. Thompson, 2 Wheat., 336; Watts v. Waddle, 6 Pet., 389; Vail v. Nelson, 4 Rand., 478; Bates v. Wheeler, 1 Scam., 54; Stewart v. Raymond Rail Road Co., 7 S. & M., 568; Wood v. Perry, 1 Barb. Sup. Ct. R., 114; Secrest v. McKenna, 1 Strobh's Eq., 356; Richardson v. Linney, 7 B. Monr., 571; Taylor v. McCardle, 9 S. & M., 230. A party seeking a specific performance cannot be excused from proper diligence, on the part of the defendant. Longworth v. Taylor, 1 McLean, 395; Doyle v. Teas, 4 Scam., 202. And a subsequent offer to fulfill his part of the agreement, by a party who has failed to perform at the time stipulated, will not justify the granting of a decree of specific performance. Unless performance can be shown, or the benefit of performance secured to the defendant, specific performance will not be decreed in favor of a vendee, even if possession has been given and improvements made by him. Simmons v. Hill, 4 Har. & M'Hen., 252. This principle, that a plaintiff must perform the essential parts of his contract, is fully carried out, at law, in cases concerning deeds. Fuller v. Hubbard, 6 Cowen, 13; Fuller v. Williams, 7 id., 63; Newcomb v. Bracket, 16 Mass., 161, Eames v. Savage, 14 id., 425; Eveleth v. Scribner, 3 Fairf., 24.

[2] *He must do equity, who asks equity.*] "There are few cases in which a court of equity will insist on the maxim that he who asks equity must do equity, with more vigor, than in those for specific performance." Eastman v. Plumer, 46 N. H., 464 See also Tripp v. Cook, 26 Wend., 143, 160; Bruen v. Hone, 2 Barb., 536; Linden v. Hepburn, 3 Sandf., 668; Williams v. Fitzhugh, 33 N. Y., 444, 452; Wheeler v. Tanner, 39 N. Y., 481, 502, 505; Abernathey v. Church of the Puritans, 3 Daly, 1. The rule is well settled that where a party asks the specific performance of a contract, he must first show, either that he has performed, or has offered and is willing to perform all that his contract can at any time call for; it will be a defence to his action to show that he has made

1. *The performance of past acts.*

§ **901.** Of what terms must the plaintiff show the performance? The answer is that he must show performance of (1) the express and essential terms of the contract,

(2) Its implied and essential terms, and

(3) All representations made at the time of the contract on the faith of which it was entered into: but that he need not show performance of

(4) Non-essential terms,

(5) The terms of a collateral contract, or

(6) Terms of which the defendant has prevented or waived the performance.

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default in a matter of serious importance. More v. Skidmore, 6 Litt., 453; Grecnup v. Strong, 1 Bibb., 590; Stewart v. Raymond, 15 Miss., 568; Hoen v. Simmons, 1 Col., 119; McKinney v. Watts, 3 A. K. Marsh, 268; West v. Case, 3 Ind., 301; Stevenson v. Dunlap, 7 T. B. Monr., 134; Hepburn v. Auld, 5 Cranch, 262; Stone v. Buckner, 12 Sm. & Marsh, 73; Snodgrass v. Wolf, 11 W. Va., 158; Clay v. Turner, 3 Bibb., 52; Boone v. Missouri Iron Co., 17 How., 340; Vennum v. Babcock, 13 Iowa, 194; Ganatson v. Vanboon, 3 Iowa, 128; Bearden v. Wood, 1 A. K. Marsh, 450; Logan v. McChord, 2 A. K. Marsh, 224; Rogers v. Sanders, 16 Me., 92; Tyler v. McCardle, 17 Miss., 230; Earl v. Halsey, 14 N. J. Eq., 332; Thorp v. Pettit, 16 N. J. Eq., 488; Colson v. Thompson, 2 Wheat., 336; Slaughter v. Hains, 1 Ind., 138; Satterfield v. Keller, 14 La. An., 606; Wilson v. Brumfield, 8 Blackf., 146; Watts v. Waddle, 6 Pet., 384; Bryan v. Read, 1 Den. & Batt. Eq., 78; Reed v. Nor, 6 Greg. 283; Hooner v. Calhoun, 16 Gratt., 109; Jordan v. Deaton, 23 Ark., 304; Scott v. Shepherd, 3 Gilman, 83; King v. Knapp, 59 N. Y., 762; Jones v. Roberts, 6 Call, 187; Cox v. Boyd, 38 Ill., 42; Hanney v. Banks, 1 Rand, 408; Frakfort Turnpike Co. v. Churchill, 6 Monr., 427; Kitchen v. Coffyn, 4 Ind., 504; Board of Supervisors v. Hennelemry, 41 Ill , 179; Huldeman v. Chambers, 19 Texas, 1; Furbush v. White, 25 Me., 219; Jones v. Alley, 4 Greene, Iowa, 181; O'Brien v. Pertz, 48 Md., 562; Marburgh v. Cole, 49 Md., 402.

Executory contract to sell land, relation of the parties.] In substance the same relation exists between the vendor and vendee in an executory contract for the sale and purchase of real estate, as exists between mortgagee and mortgagor. The same general rules govern both cases. The legal title to the estate in both cases, is held as a security for the debt; the owner of the equitable title receives it, when the debt is paid. Ellis v. Hussey, 66 N. C., 591; Jones v. Boyd, 80 id., 258.

Two acts to be done at the same time] Where this is the case, neither party can maintain an action against the other, unless he alleges performance, or an offer to perform. Brasswell v. Pope, 80 N. C., 57.

Equity does not always require an exact performance.] Equity will seek to do exact justice between the parties, and a party may sometimes be excused from a literal fulfillment of his contract, where the failure does not relate to matters of substance. Davis v. Hone, 2 Sch. & Lef., 347; Counter v. McPherson, 5 Moo. P. C. C., 83, 108; Oram v. Merrill, 27 Iowa, 476.

Omission by mutual consent of a part of the contract] Where a particular stipulation in the contract, which does not materially affect the rights or interests of the parties, has been omitted by mutual consent; this will not deprive a party of his right to a decree for specific performance, when he has otherwise fully performed. Portland R. R. Co. v. Grand Trunk R. R. Co., 63 Me., 90.

Lastly it will be necessary to consider

(7) Terms, the performance of which has become impossible without the plaintiff's fault or default.

§ **905.** (1) As to the express terms nothing more need now be said. The only important point will be considered when we come to the difference between essential and non-essential terms.

§ **906.** (2) The performance must extend to such of the implied terms as are essential. Thus where an intended lessor agreed to finish a house for an intended lessee, who was to do the repairs during the intended term, the court held that in such a contract was implied an undertaking to deliver it in complete tenantable repair proper for houses of the character demised: and this undertaking not having been, in the judgment of the court, performed, the intended lessor's bill for specific performance was dismissed with costs.(*c*) The case might probably have been determined as one rather of construction than of the implication of terms, *i. e.*, that to finish a house means to finish so that the house shall be in proper repair.

§ **907**. (3) Performance must be shown of representations of future acts made at the time of the contract on the faith of which the contract was entered into. These representations(*d*) need not amount to a guarantee, nor in case of non-performance give a right to an action either for damages or for cancellation of the contract: but yet, if made and not performed, they are a defense to an action for specific performance.(*e*)

§ **908.** Thus where a vendor at a sale represented that he would make improvements in the access to the property sold, and failed to do so, the court refused specifically to perform his contract:(*f*) and the same was the decision of the court in a case where the vendor by his agent represented that a church should be erected in the immediate neighborhood of the building ground which was the subject of the contract, and that he would complete certain streets, and the purchase was made on the faith of these represen-

(*c*) Tildesey v. Clarkson, 30 Beav., 419; cf. Oxford v. Provand, L. R. 2 P. C., 156. Distinguish Chappell v. Gregory, 34 Beav., 250.

(*d*) As to what representations will in equity be considered as part of the contract, see supra § 624 et seq.

(*e*) Lamare v. Dixon, L. R. 6 H. L., 422.

(*f*) Beaumont v. Dukes, Jac., 414.

tations, which the plaintiff, however, never carried into effect.(*g*)

§ **909**. We may here briefly inquire into how far maps or plans of the property, exhibited by the vendor at the time of entering into contract, form representations of the kind we are now considering.(*h*)

§ **910**. Where the parties have matured their agreement into a contract, and that contract is silent on the subject of such map or plan, the court will not from such exhibition infer a contract.(*i*) This applies alike to private contracts and to special Acts of Parliament, so that notices given, and plans and sections deposited, are not to be used in construing an act afterwards, except so far as they are referred to and thus incorporated in the act of Parliament itself.(*j*) But where they are so referred to and incorporated, effect must be given to them according to the terms of the act.(*k*)

§ **911**. Where the map thus exhibited delineates the intended division of the property by new roads, the vendor may not afterwards divide the land in a manner so different as to attract a population entirely different from that which would have been produced by the execution of the plan proposed by the map.(*l*)

§ **912**. But though the exhibition of a map may bind to this extent, it will not oblige to an exact performance of the scheme it embodies. Thus where a plan was referred to in the contract, and used as a description of the part of the property in question, and on this plan the measurement and width of the street were marked, but there was nothing in the contract which distinctly pointed out that part of the plan as binding the parties, Lord Langdale, M. R., held that it did not form part of the contract, so as to entitle one party to relief against an encroachment on the width of the street.(*m*)

§ **913**. In another case the particulars referred generally

(*g*) Myers v. Watson, 1 Sim. N. S , 523.

(*h*) Cf. Glave v. Harding, 27 L. J Ex., 286, as to the effect of plans on (alleged) implied grants of easements.

(*i*) Feoffees of Heriot's Hospital v. Gibson, 2 Dow, 301; Squire v. Campbell, 1 My. & Cr., 459. Cf. and distinguish Nene Valley Drainage Commissioners v. Dunkley, 4 Ch. D., 1, where the plan was held to be incorporated with (though not referred to in) the contract.

(*j*) North British Railway Co. v. Tod, 12 Cl. & Fin., 722; Beardmer v. London and North-Western Railway Co., 1 Mac. & G., 112.

(*k*) Att-Gen. v. Tewksbury and Malvern Railway Co., 1 De G J. & S., 423; Little v. Newport, Abergavenney, and Hereford Railway Co., 12 C. B., 752.

(*l*) Peacock v. Penson, 11 Beav., 355, 361.

(*m*) Nurse v Lord Seymour, 13 Beav., 254. Distinguish Roberts v. Karr, 1 Taunt., 495; Espley v. Wilkes, L. R. 7 Ex , 298.

to an accompanying plan, and on the plan several roads were marked out so as to provide frontages for all the lots, and the lines of roads were marked out on the land itself in accordance with the plan: Knight Bruce, V. C., held, that in the absence of any clause in the particulars or conditions of sale providing for any rights of way beyond a road leading into the nearest highway, such road was all that the purchaser was entitled to.(*n*)

§ 914. Where the sale plan, instead of, as in the previous cases, representing an intended and future state of the property, accurately represents it in its actual and present state, it has been held that it will not carry the case higher than a view of the property. Therefore, where a plan represented a well on lot 4 communicating with a reservoir on lot 2, and that communicating with the inn which was on lot 1, which the plaintiff purchased, and the vendor conveyed lots 2 and 4 without any reservation to the plaintiff of a right to a flow of water from the well, the plaintiff's demand for compensation for the loss of the water was refused.(*o*) St. Leonards, however, considered this case open to observation.(*p*)

§ 915. (4) In the averment of performance by the plaintiff, equity, as already stated, discriminates between the essential and the non-essential terms of a contract: and to furnish the defendant with a ground for resisting the action, the non-performance of the plaintiff must be a term important and considerable.(*q*) The Court of Chancery frequently interfered at the instance of a party who might have been debarred from relief at Common Law, because unable to allege performance in the very terms of the contract, which is by the Common Law essential.(*r*) Thus, for example, where A. contracted to sell property to B., and by the same contract it was also stipulated that A. should continue tenant from year to year of the land, and it happened from embarrased circumstances he was unable to fill the tenancy, this was, from the determinable nature of the holding, held to be a matter of consideration, and so not a

(*n*) Randall v. Hall, 4 De G. & Sm., 343
(*o*) Fewster v. Turner, 11 L. J. Ch., 161.
(*p*) St. Leon. Vend., 20.
(*q*) Modlen v. Snowball, 31 L. J. Ch. 44; 10 W. R. 24, affirming S. C. 29; Beav., 641; Reeves v. The Greenwich Tanning Co. Limited. 2 H. & M., 54.
(*r*) See per Lord Redesdale in Davis v. Hone, 2 Sch. & Lef. 347; supra, § 29.

bar to specific performance of the contract for sale.(*s*) And all the cases in which the court grants a vendor asking for specific performance indulgence in the making out of his title,(*t*) or allows him to enforce the contract with compensation,(*u*) are, of course, illustrative of the principle now before us.

§ **916.** In a case before the Privy Council, the judgment may at first sight appear to go so far as to assert that no default of performance on the part of the plaintiff short of that which goes to the whole consideration for the promise sued on, is available as a defense against specific performance.(*v*) But probably such reading is incorrect and the intention of their lordships was to draw the distinction between essential and non-essential terms.

§ **917.** (5) Where that, on the non-performance of which by the plaintiff the defendant relies, is in its nature a collateral and separate contract, or is part of or referable to such a contract, though between the same parties and entered into at the same time, and having relation to the same subject-matter as the contract which the plaintiff seeks to enforce, the court will not consider the default by the plaintiff in respect of the one contract as any bar to the specific performance of the other, though such default may give the defendant a cross right of action on legal or equitable grounds.(*w*)[1]

(*s*) Lord v. Stephens, 1 Y. & C. Ex., 222.
(*t*) See infra, § 1339 et seq.
(*u*) See infra, § 1178 et. seq.
(*v*) Oxford v Provand, L. R., 2 P. C., 135; cf. Lamare v. Dixon, L. R., 6 H. L., 414.
(*w*) Phipps v. Child, 3 Drew, 709.

[1] *Condition precedent or subsequent.*] In a conditional contract one party may fail to perform the condition. The contract becomes absolute as soon as the condition has been performed, but until it is performed it cannot be specifically enforced. Where it is a condition precedent the estate is avoided by not permitting it to rest until the condition is literally performed. Where it is a condition subsequent, its non-performance defeats the estate by divesting the party of his title. It is very material to notice this distinction for the reason that a court of equity "can, upon principle, interfere with and control the effect of one species of condition and not of the other. A man enters into a contract, or makes a deed, or settlement, or a will, and he agrees to grant or devise an estate upon a condition which he declares must be performed before the person to be benefited can take it. No court of law or equity can have a right to say that the condition which is lawful in itself, and one the party had a right to impose, shall be dispensed with. In order to do this, the contract or act of the party himself must be annulled, and one, created by the court, put in its place. The principle whereon the court is to act in relation to conditions subsequent is widely different. In cases of this sort, if a breach or non-performance happens, the effect of which is to work a forfeiture, or divest an estate, the court, acting upon the principle of compensation to the party for the injury sustained by the breach, will interpose and prevent the forfeiture. On account of the nature of conditions subsequent, they are said to fall within the

§ **918**. Thus where A. contracted with B., the owner of a plot of land, to erect a villa on it, and to keep it insured in the joint names of A. and B. in the county fire office, and B. agreed as soon as the house should be completed, to grant a lease of the plot to A., and that if A. should not perform his part, the contract for the lease should be void; and the contract also stipulated that A. should have the option of purchasing the fee within two years; A erected the villa, but insured in the wrong office, and in his own name alone, and then brought his bill for a sale under the option to purchase; and it was held by Lord Romilly, M. R., that this option was independent of the right to a lease, and that notwithstanding the plaintiff's default in respect of the latter right, the former subsisted, and he accordingly decreed a specific performance.(*x*)[1]

(*x*) Green v. Low, 22 Beav., 625.

lenient principle by which equity relieves against penalties; and the court will only give relief where compensation could be made in damages. There may even be cases of conditions subsequent unperformed, in which the court will not relieve from forfeiture on account of the difficulty of ascertaining with any degree of certainty the amount or adequately of compensation to be allowed." McCoun, V. C., in Wells v. Smith, 2 Edw. Ch., 78.

[1] The cases at law, concerning dependent and independent covenants, proceed upon the same principle and are in close analogy with those of equity. Manning v. Brown, 1 Fairf., 49, is an authority of this kind. A., there, covenanted to convey to B. a certain lot of land, if certain notes of hand, given at the same time, payable at a future day, should be paid at maturity by B.; and it was further agreed that, in failure of payment of said notes by B., the agreement was to be void, B. to be liable to pay all damages that should have occurred to A., and to forfeit all that should previously have been paid. In a suit on one of the notes, it was held that the promise on the notes, and the covenant to convey were independent, and that a suit on the former might well be maintained, without showing a conveyance or an offer to convey. Leftwich v. Coleman, 3 How. Miss., 167; and Rector v. Price, 6 Ala., 321, are decisions to the effect, that an action will lie upon a note, given for the purchase money of land, payable on a day certain, where there is an agreement to to convey by deed upon the payment of the note, the agreement being independent. And where, on an agreement for the sale of land, the vendee gave his note for the purchase money, payable at the end of twelve months, and took the vendor's penal bond to make him a "lawful title, or cause it to be made," within the same period, it was held, that the note and the bond being wholly separate and disconnected with each other, the performance on the one side was not a condition precedent to the performance on the other, and unless there had been some stipulation to the effect, the agreements were entirely independent. Martin v. Bobo, 1 Speers, 26. Nor yet are mutual contracts mutual conditions, when each goes only to a part of the consideration of the other, and a breach of either may be compensated in damages. And, therefore, where the defendants hired of the plaintiff two slaves at certain monthly wages, and the plaintiff agreed to permit the defendants to transport his cotton to market, at a certain stipulated rate per bale, in payment of the wages of the slaves, it was held that the stipulations of each party were independent, and that the plaintiff might recover the wages of the slaves, without averring that he had tendered his cotton to be transported to market by the defendants. Rice v. Sims, 2 Bailey, 82.

§ **919**. So, where in a deed for the dissolution of partnership, one partner assigned to another certain foreign shares, and covenanted for further assurance; and the other partner covenanted with the former for indemnity against certain liabilities: a further assurance of the shares became necessary, and on a bill filed to enforce specific performance of the covenant to that effect, it was held by Knight Bruce and Turner, L. J. J., overruling Lord Romilly, M. R., that a breach of the covenant to indemnify which the plaintiff had entered into with the defendant was no defense to the suit. The two covenants were independent, so that the performance of the one was not to be resisted by reason of the non-performance of the other.(*y*)

§ **920**. (6) A defendant who has waived the performance by the plaintiff of that was on his part to be performed cannot, of course, use the non-performance as a defense; but the burthen of proving this waiver of course rests on the plaintiff.(*z*)

§ **921**. Still more clearly, if possible, is non-performance by the plaintiff excused when that has resulted from the neglect of default of the defendant.(*a*)[1] So where the purchaser prevents the vendor from completing his title, he will be compelled to forego an objection he may raise on the score of that incompleteness.(*b*)

§ **922**. With regard to infancy, an infant heir cannot avail himself of his disability to excuse the non-assertion of his right under an executory contract made with his ancestor, when the immediate performance of his part of the contract is essential to the interest of the other party; as, for example, of a contract to lay out money in building within three years.(*c*)

§ **923**. (7) We shall now consider how far the impossibility of performing the plaintiff's part arising without any fault or default on his part furnishes an excuse for non-performance. In those cases in which all that was to have been performed by the plaintiff has become entirely inca-

(*y*) Gibson v Goldsmid, 5 De G. M. & G., 757; reversing S. C., 18 Beav., 584.
(*z*) Lamare v. Dixon, L. R., 6 H. L., 414.
(*a*) Hotham v. East India Co., 1 T. R., 638
(*b*) Murrell v. Goodyear, 1 De G. F. & J., 432 (S. C., before Stuart, V. C., 2 Giff. 51).
(*c*) Griffin v. Griffin, 1 Sch. & Lef., 352.

[1] See Stewart v. Raymond Rail Road Co., 7 S. & M., 568; Tyler v. McCardle, 9 id., 230; Kirby v. Harrison, 2 Ohio (N. S.), 326.

pable of being executed, the plaintiff cannot demand the performance by the other party, because his non-performance is a total failure of the consideration which was to have moved from him.

But where the impossibility refers not to the substantial, but only to the exact and literal performance of the contract, the court will struggle with matters of form in order to do complete justice between the parties; but it will carefully avoid going so far as to make a new contract between them.(*d*) Hence arise the cases on compensation.(*e*)

§ **924**. As to the cases in which the plaintiff has performed a substantial part of his contract, and then the remaining part has become impossible by reason of circumstances not dependent upon him and without his fault, a distinction has been drawn between those cases in which the plaintiff has not, by performing that part of the contract which he has performed, altered his position, and those cases in which he has so altered his position by his part performance of the contract by the other party in the former case, and enforcing it in the latter.

§ **925**. This distinction rests almost entirely on the authority of Gilbert, C.B., in a passage in his "Lex Prætoria,"(*f*) but has been approved by subsequent writers,(*g*) and seems worthy of attentive consideration. "Here," says his Lordship in the passage in question, "it is to be noted that the plaintiff that exhibited his bill upon the foot of performing the bargain on his part, ought to show that he has performed all that is to be done on his part, or is ready to do it; for where any part (which he should have performed) is become impossible to be performed at the time of exhibiting his bill, then he can have no specific execution, because he cannot specifically execute on his own part: as in the case of my Lord Feversham, which was on a marriage agreement, whereby he contracted to settle the manor of Holmly on his wife and the heirs of their bodies, and clear it of incumbrances, and settle a certain maintenance on his wife, and likewise sell some pensions in order to make a further provision for his wife and the issue of that marriage; and Sir George Sandys the father-in-law, agreed to settle £3,000

(*d*) Counter v. Macpherson, 5 Moo. P. C. C., 83, 108.

(*e*) See infra, Part IV., chap. ii, § 1174 et seq.; also Norris v. Jackson, 3 Giff., 396.

(*f*) pp. 240-2.

(*g*) 1 Fonbl. Eq. Book I., c. 6, s. 3; Story, Eq. Jur., s. 772.

per annum on the Lord Feversham for life, remainder to the wife for life, and so to the issue of the marriage. Lord Feversham cleared the manor of Holmly, settled it accordingly, and settled the separate maintenance, but did not sell the pensions, nor settle the further provisions: the wife died without issue, and the Lord Feversham preferred his bill to have the £3,000. per annum settled on him for life: but decreed because Lord Feversham was *in statu quo* as to all that part of the agreement which he had performed, and having not performed the whole, and the other parts being now impossible, and no compensation being possible to be adjusted for it, he had no title in equity to have performance of Sir George's part of the agreement, since such performance could not be mutual. But the issue of Lord Feversham might have been relieved, because in no default." Lord Feversham v. Watson, Rep. t. Finch, 445, 2 Freem. 25, Skin., 287.

To make the foregoing statement perfectly clear, it should be added that, in the settlement made by the plaintiff, the reversion expectant on the default of issue by his late wife was reserved to him in fee, so that the settlement had in the event operated nothing.(*h*)

§ 926. "But if," continues the Lord Chief Baron, "a man has performed so much of his part of the agreement as he is not *in statu quo*, and is in no default for not performing the residue, then he shall have a specific execution from the other party of the agreement: as if a man has contracted for a portion with his wife, and has agreed to settle upon the wife and her issue, lands of such a value free from incumbrances, and he sells part of his land to disincumber, and is going on to disincumber and settle the rest: then if the wife dies without issue before the settlement be actually made, yet he shall have a portion, because he cannot be *in statu quo*, having sold part of his lands, and there is no default in him, since he was going on to disincumber and settle the rest; therefore the accident of the death of his wife doth not alter his right to his wife's portion." Meredith v. Wynne, Eq. Abr. 70, p. 15; Gilb. Eq. Rep., 70; Prec. Ch., 312: 2 Verne., 448.[1]

(*h*) Powell on Contracts, 22.

[1] The doctrine seems to be well stated in Breckenridge v. Clinkinbeard, 2

§ **927**. To prevent error, it may be well to observe that, as regards marriage contracts, the rule under consideration, as well as many other rules relating to the specific performance of purely executory contracts, does not apply. "There is," said Lord Hardwicke, "a difference between agreements on marriage being carried into execution and other agreements; for all agreements besides are considered as entire, and if either of the parties fail in performance of the agreement in part, it cannot be decreed in specie, but must be left to an action at law: in marriage agreements it is otherwise, for though either the relations of the husband or wife should fail in the performance of their part, yet the children may compel a performance: if the mother's father, for instance, hath agreed to give a portion, and the husband's father hath agreed to make a settlement, though the mother's father do not give the portion, yet the children may compel a settlement, for non-performance on one part shall be no impediment to the children's receiving the full benefit of the settlement; so if there be a failure on the part of the father's relations, it is the same."(*i*)

The distinctions in this respect as regards marriage contracts are numerous, but they are not properly within the scope of this volume, they need not here be further noticed.

2. *The performance of future acts.*

§ **928** We may now consider the obligation which lies on the plaintiff, in an action for specific performance, of being ready and willing to perform all acts that on his part yet remain to be performed.

§ **929**. On the ground of this obligation, trustees in bankruptcy are not liable as plaintiffs to enforce a contract entered into by the bankrupt, which would have involved covenants on his part, unless they will personally enter into the covenants into which the bankrupt would have entered:(*j*) whereas where specific performance is sought

(*i*) In Harvey v. Ashley, 3 Atk., 611; Cf. Lee v. Lee, 4 Ch. D., 175; Jeston v. Key, 19 W. R. 342, 864.

(*j*) Ex parte Sutton, 2 Rose, 86; Willingham v. Joyce, 3 Ves., 168; Powell v. Lloyd, 2 Y. & J. 372; per Grant M. R. in Weatherall v. Geering, 12 Ves., 513.

Litt., 127. It is there said that where a party claims specific performance of a contract and although he has not wholly performed his part, is in no default as to the residue, but cannot be placed *in statu quo*, he is entitled to a specific performance, but is not so entitled when in default, and, when by receiving compensation for what he has done, he may be placed *in statu quo*. See, also Hays v. Hall, 4 Porter, 374; McCorckle v. Brown, 9 S. & M., 167.

not by, but against, persons having a fiduciary interest only, they are bound to covenant only so as to bind the property and not themselves personally.(*k*)

§ **930**. And so of bankruptcy; if the plaintiff be the vendor, the commission of an act of bankruptcy, though without proof of the existence of any debt to support a petition, is a bar to an action for specific performance, because the plaintiff may be incapable of conveying the estate, which may belong not to him, but to his trustee.(*l*) If on the other hand the plaintiff be the purchaser, he cannot enforce the contract, because he is incapable of so paying the money to the vendor, as that the vendor shall be certain of being able to retain it against the trustees.(*m*)

§ **931**. Bankruptcy does not of itself discharge a contract, either for the sale of an estate of inheritance or for a lease; for, with regard to the latter, the trustee may covenant in the same manner as the bankrupt would have been bound to.(*n*) By the 146th section of the statute 12 & 13 Vict., c. 106, the vendors of lands might compel the assignees to elect whether they would abide by or decline an agreement for sale:(*o*) and now by the 23d section of the bankrupt act, 1869, where any property of the bankrupt acquired by the trustee consists of unprofitable contracts, the trustee, notwithstanding he has endeavored to sell, or has taken possession of such property, or exercised any act of ownership in relation thereto, may by writing under his hand disclaim such property, and thereupon the contract shall be deemed to be determined from the date of the order of adjudication.

It has already been noticed that specific performance cannot be enforced against a trustee in bankruptcy or liquidation without his consent.(*p*)

§ **932**. So the insolvency of the plaintiff is a ground of defense:(*q*) and, to constitute this defense in the case of a continuing contract as a lease, it is not necessary that the

(*k*) Page v. Broom, 3 Beav., 836; Phillips v. Everard, 5 Sim., 102; Stephens v. Hotham, 1 K. & J., 571; and see further, as to covenants by trustees, Worley v. Frampton, 5 Ha., 56; Onslow v. Lord Londesborough, 10 Ha., 67; Cooper Mining Co. v. Beach, 13 Beav., 478; Hodges v. Blagrave, 18 Beav., 404; Hare v. Burges, 4 K. & J., 45.

(*l*) Lowes v. Lush, 14 Ves., 547; Cf. McNally v. Gradwell, 16 Ir. Ch. R., 512, 518.

(*m*) Franklin v. Lord Brownlow, 14 Ves., 550.

(*n*) Brooke v. Hewitt, 3 Ves., 253.

(*o*) Cf. Buckland v. Papillon, L. R., 2 Ch., 67.

(*p*) Halloway v. York, 25 W. R., 627; supra, § 225.

(*q*) Crosbie v. Tooke, 1 My. & K., 431; Price v. Assheton, 1 Y. & C. Ex., 441.

plaintiff should be proved to have given up all his property for the benefit of his creditors, but there must be proof of general insolvency, so as to show that the plaintiff is not in a situation to perform the covenants on his part.(*r*)[1] Thus Lord Eldon, remarking on the insolvency of an intended lessee as being an objection of more or less weight depending on the circumstances, in the case then before him dissolved an injunction against an ejectment by the landlord.(*s*)

§ **933**. How far insolvency would be an objection, if the plaintiff had subsequently become affluent, does not appear to have been decided.(*t*)

§ **934**. Where the interest under a contract has been assigned, the insolvency of the original contractor, who is the assignor, is no defense, though that of the assignee would be.(*u*)

§ **935**. On like grounds, the felony of a plaintiff would be a bar to specific performance.(*v*)

§ **936**. And the same principle is illustrated by a case where the deeds were destroyed. It was a suit by a vendor on an ordinary contract for sale of lands: in such a contract is implied, as an essential term on the part of the vendor, the proof of the due execution of the deeds which constitute his title, and the delivery up of them to the purchaser: the deeds having been subsequently destroyed by fire, the performance of this term by the plaintiff was rendered

(*r*) Neale v. Mackenzie, 1 Ke., 474; Willingham v. Joyce, 3 Ves., 168; McNally v. Gradwell, 16 Ir. Ch. R., 512, 519.
(*s*) Buckland v. Hall, 8 Ves., 92.
(*t*) Price v. Assheton, 1 Y. & C. Ex., 82, 91; cf. Neale v. Mackenzie, 1 Ke., 474; McNally v. Gradwell, 16 Ir. Ch. R., 512, 519.
(*u*) Crosbie v. Tooke, 1 My. & K., 431.
(*v*) Willingham v. Joyce, 3 Ves., 168.

[1] *Insolvency of a party to an action for specific performance.*] In England the law appears to be that "upon the sale of a bankrupt's estate he is usually made to convey and covenant for title. His covenants, however, are obviously of little value, and it would seem that he cannot be compelled to execute a conveyance. But the court of bankruptcy is empowered, upon the application of the assignees or of the purchaser, if the bankrupt shall not try the validity of the adjudication, or if there shall have been a verdict at law establishing its validity, to order the bankrupt to join in the conveyance, and if he do not execute it within the time directed by the order, then he, and all persons claiming under him, will be estopped from objecting to such conveyance, and all estate, right or title which he had in the property will be as effectually bound as if such conveyance had been actually executed by him." Dart on Ven. and Pur., 250, 251; Lower v. Lush, 14 Ves., 547.

Insolvency of party, demand.] In an action for specific performance, where no demand has been made, it is not sufficient to aver and prove that the defendant is insolvent. Bell v. Thompson, 34 Ala. 633; Carter v. Thompson, 41 id., 375.

impossible, and the contract could not be specifically performed.(*w*)[1]

(*w*) Bryant v. Rusk, 4 Russ., 1; cf. Moulton v. Edmonds, 1 De G. F. & J., 246, where the secondary evidence of the execution of the missing deeds was held sufficient.

[1] *When the deed must be delivered.*] In Birdsall v. Waldron, 2 Ed.'s Ch., 315, the vice chancellor said, "the court will not order purchase money to be paid before a title is given, unless under special circumstances, such as taking possession contrary to the intention or against the will of the vendor; or where the purchaser makes frivolous objections to the title, or throws unreasonable obsticles in the way of completing the purchase, or is exercising improper acts of ownership by which the property is lessened in value." See, also, Van Campen v. Knight, 63 Barb., 205.

Implied offer of performance.] The offer of the party making the demand to perform his part of the agreement is implied, and where the other party refuses to comply this dispenses with the necessity of any other offer. Ramson v. Johnson, 1 East, 208; Finney v. Ashley, 15 Pick., 546. See, however, Englander v. Rogers, 41 Cal, 420.

CHAPTER XXI.

OF ACTS IN CONTRAVENTION OF THE CONTRACT.

§ **937**. In the last chapter we considered cases in which the plaintiff had disentitled himself by default on his part: we shall now consider the closely allied cases where he has disentitled himself, not by default merely, but by acts in fraud or contravention of the contract, or at variance with it, or tending to its rescission and the subversion of the relation established by it. For where the party to a contract who asks the intervention of the court for its specific execution has been guilty of such conduct, that circumstance may be put forward as a defense to the action. Sometimes the facts may be evidence of a mutual agreement between the parties to rescind the contract: but even where not amounting to this, they may be sufficient to disentitle the plaintiff to ask for the intervention of the court in specific performance.

§ **938**. Still more plain is the case, if the acts be such as would have worked a forfeiture of all benefit of the contract if it had been executed; it would be idle for the court to compel a grant of that which, if granted, would have been forfeited,(*a*)—to create a legal relation which, if created, would be immediately dissoluble.(*b*)[1]

§ **939**. The cases by which this principle is most extensively illustrated are on contracts for leases. With regard to these, it is well established that where a person, holding under an agreement, commits waste, treats the land in an unhusbandlike manner, or acts in breach of covenants which would be contained in the lease, and for which acts a right of re-entry would accrue to the landlord, such person can-

(*a*) See per Lord Romilly, M. R., in Lewis v. Bond, 18 Beav., 85

(*b*) Per Turner, V.C., in Gregory v. Wilson, 9 Ha., 687.

[1] *Forfeiture of estate.*] Equity will not enforce a forfeiture Warner v. Bennett, 31 Conn., 461; Leffoyr v. West, 2 Ind., 514; Smith v. Jewett, 40 N. H., 530; White v. Port Huron R. R. Co., 13 Mich., 356; Fitzhugh v. Maxwell, 34 id., 138; Orr v. Zimmerman, 63 Mo., 72; Palmer v. Ford, 70 Ill., 369; Beecher v. Beecher, 43 Conn., 556.

not enforce a specific performance of the contract.(*c*) The same has been held in respect of covenants to repair.(*d*)[1]

§ **940**. It seems that even where the lease, when executed, would contain no provision for re-entry, yet such acts, when amounting to a forfeiture, as for example, a gross case of waste, which is in all cases a forfeiture of the place wasted, would prevent a specific performance of the contract (*e*)

§ **941**. In order that acts may thus be a bar to the plaintiff's relief, they must, it has been said, be gross and willful.(*f*) That expression seems to have been originally applied to cases in which the breaches would not work a forfeiture of the legal interest.(*g*) If applicable at all to cases where there would be a proviso for re-entry for breach, it seems to mean that the acts must be (1) Such as would work a forfeiture at common law, and (2) Such as would not justify or permit relief against the forfeiture in a court of equity.

§ **942**. Where the court of chancery found such a conflict

(*c*) Per Lord Eldon in Hill v. Barclay, 18 Ves., 63; Lewis v. Bond, 18 Beav., 85; Gregory v. Wilson, 9 Ha., 683.
(*d*) Nunn v. Truscott, 3 De G. & Sm., 304.
(*e*) See per Lord Eldon in Duke of Somerset v Gourlay, 1 V. & B., 73.
(*f*) Parker v. Taswell, 2 De G. & J., 559, 573.
(*g*) Hare v. Burges, 5 W. R., 585.

[1] Jon v. Banister, 39 Eng. Law and Eq., 599, is an analogous case, though not concerning specific performance. The case was this: In a lease of copyhold house property for twenty-one years, the lessee covenanted, amongst other things, to pay the rent, keep in repair, and insure, etc., and the landlord covenanted that he would, at the expiration of the term of twenty-one years (provided all arrears of rent should then have been paid, and all the covenants should then have been well and truly performed and kept), at the request in writing of the lessee, grant a new lease of the premises for a further term of twenty-one years, at the same yearly rent, and subject to the proviso and agreements in the same indenture contained (including the covenant for renewal), and so from time to time upon the expiration of every subsequent term of twenty-one years, provided such request in writing should be given as aforesaid. The lessee expended large sums of money in building houses on the premises, and at the expiration of the first twenty-one years a new lease was granted in the same terms for twenty-one years. In both leases there were the usual covenants for re-entry on breach of any of the covenants. Some months before the expiration of the second term of twenty-one years the lessee gave notice in writing that he would require a renewal. At that time one of the houses was much out of repair, and the lessee allowed it to remain out of repair, on the ground that from communications with the lessor it was doubtful whether a new lease would be granted, in consequence of an alleged forfeiture, by reason of having failed to keep the fire insurance up for a few days. Held, first, that the condition precedent for the present renewal was twofold—request in writing and compliance with the covenants; and that the double condition was not confined to the first renewal, but applied *toties quoties*. Secondly, that the court could not grant an injunction to the lessee, to restrain the lessor from recovering in ejectment, because of the lessee's breaches of contract in not repairing the premises within a reasonable time.

of evidence as left it in doubt whether there had been such a breach of covenant as to render it proper and expedient to refuse specific performance on that ground, it took the course of directing the lease to bear the date of the contract, and leaving the parties to settle their legal rights at law.(*h*)

§ **943**. It follows from what has been said that three classes of cases fall to be considered, as arising out of contracts for leases.

(1) Where the acts complained of have led to the refusal of relief:

(2) Where they have not led to this refusal: and

(3) Where the relief has been granted and the question of breach left for decision at common law.

1. *Where the acts complained of have led to refusal of specific performance.*

§ **944**. In Thompson v. Guyon(*i*) a lease had been granted with a proviso for re-entry on breach of any of the covenants, and a covenant to grant a further term at the end of the original term, if it should not have been sooner determined by the lessee's acts or defaults: the lessee paid all his rent, and continued in possession to the end of the term, but had in fact committed breaches of covenant during the term, of which the lessor was not cognizant till after its determination: a bill for specific performance of the covenant to renew was dismissed, and an injunction against an ejectment was refused, on the ground that the lessor ought not to be placed in a worse condition at the expiration of the term than he would have been if he had known of the breach, and availed himself of it during the term.

§ **945**. In Gregory v. Wilson(*j*) possession had been taken under a contract for a lease: breaches were alleged of the covenants which should have been inserted in the lease to insure and also to repair: it was contended as to the first that the receipt of rent after knowledge was a waiver of all the breaches, but the court held such waiver to have no longer operation at law than on the breaches antecedent to the receipt, and not to preclude the effect of the sub-

(*h*) Rankin v. Lay, 2 De G. F. & J., 65. See infra, § 954 et seq.

(*i*) 5 Sim., 65.

(*j*) 9 Ha., 683.

sequent breaches of the continuing covenant: as to the breaches of the covenant to repair, it was urged that they were neither wilful nor obstinate, and that accordingly they might be relieved against in equity: but the court held that as they were not attributable to mistake or accident, and were persisted in, they were, in the contemplation of the court, willful and obstinate. The bill was accordingly dismissed.

§ **916**. In another case the defendant was lessee under a restrictive covenant against carrying on a beer shop. The plaintiff got a contract from the defendant for a sub-lease with knowledge of defendant's title and of the covenant. The plaintiff entered under the contract, and persisted in carrying on a beer shop. His bill for specific performance was dismissed with costs.(*k*)

2. *Cases where relief has not been refused.*

§ **917**. There may be cases of breach of covenant for which merely nominal damages could be obtained, or there may be cases where a breach having been committed, may have been waived: and in favor of such cases an exception may be made to the general rule that the plaintiff must prove performance of the contract on his part.(*l*) On this principle, Jessel, M. R., in a recent case held that trifling breaches by a husband of the covenants on his part in a separation deed did not debar him from enforcing the deed.(*m*)

§ **918**. But as regards breaches of covenant under contracts for leases, it seems that the breach which the court would neglect must be either such a breach as would not work a forfeiture at common law, or such that the legal forfeiture would not be relieved against in a court of equity: for the court will not relieve more readily whilst the whole thing rests in contract than it will after the legal relation has been actually created.(*n*)[1]

(*k*) Lewis v. Bond, 18 Beav., 85.
(*l*) Walker v. Jeffreys, 1 Ha., 341, 342.
(*m*) Besant v. Wood, 12 Ch. D., 605.
(*n*) Gregory v. Wilson, 9 Ha., 683.

[1] *Breach of condition precedent: rule as to relief.*] Scudder, J., said in Grigg v. Landis 21 N. J. Eq., 494: "Penalties, forfeitures and re-entries, for conditions broken, are not favored in equity, and constitute a large branch of equitable relief. Usually they are held to be securities for the payment of money and the performance of conditions, and where compensation can be made for non-

§ **949**. In one case a lessor of mines covenanted to grant a further term, and the lessee covenanted to work the mines: on a suit by the lessee for a specific performance of the covenant to grant a further term, it appeared that the lessee had not worked the mines in consequence of their being drowned out: the court, though it did not decide the point, inclined to think that this would be no bar to relief.(*o*)

§ **950**. The case of Parker v. Taswell(*p*) may usefully be consulted as the law bearing on this question was there much considered, but the court came to the conclusion that according to the true construction of the contract there had been no breach of covenant.

§ **951**. As regards all cases where the landlord is defendant and raises an objection on the ground of breach of covenants which ought to be in the lease, if the plaintiff shows that the landlord never complained before action, the land-

(*o*) Walker V. Jeffreys, 1 Ha., 341. (*p*) 2 De G. & J., 559.

payment and non-performance, equity will relieve against the rigid enforcement of the contract. This is upon the principle that a court of equity is a court of conscience and will permit nothing to be done within its jurisdiction which is unconscionable. But it is not, therefore, to be supposed that a court of equity will lightly dispense with contracts made between competent parties and substitute other agreements more in accordance with variable rules of right and conscience. Every presumption will be made in favor of such contracts, and they will be enforced according to the intention of the parties expressed and implied, unless it can be shown that thereby some hardship or wrong, not within the presumed contemplation of the parties at the time, will result from such enforcement." See, also, Livingston v. Tompkins, 4 John's Ch., 431; 2 Story's Eq. Juris., §§ 1314, 1316.

Breach of condition; subsequent relief.] Where compensation can be made for the failure of exact performance, courts of equity have in general relieved against forfeitures which arose from the breach of a condition subsequent. Popham v. Bampfield, 1 Vern., 79; Woodman v. Blake, 2 id., 222; Walker v. Wheeler, 2 Conn., 299.

Conditions precedent and subsequent, how distinguished.] There are no technical words by which conditions precedent and subsequent may be distinguished from each other. It is matter of construction and depends upon the party creating the estate, whether a condition is one or the other. 4 Kent's Com., 124; 1 Term. R., 645; 2 Bos. & Pull., 295; Finlay v King, 3 Peter's, 346; Nicoll v. New York and Erie R. R. Co., 12 N. Y., 121; Underhill v Saratoga R. R. Co., 20 id., 455; Bennett v. Strong, 26 Miss., 116; Roger v. Walker, 1 Wis., 527. For a most instructive case, presenting a learned discussion upon the distinction between conditions precedent and subsequent in contracts or covenants, see Roberts v. Brett, 6 C. B. (N. S.), 611. The main test, with respect to these conditions, is whether the vesting of the estate granted by the instrument in which they are contained is postponed until the happening of the contingent event forming the condition, or is to be divested by it. Towle v. Palmer, 1 Rob., 437. The estate is not divested by the breach of a condition subsequent in such a case; the grantor, or his heirs, have the right of re-entry, and this may be waived Ludlow v. New York and Harlem R. R. Co., 12 Barb., 440; Rhoenir v. Com'rs of Emigration, 12 How. Pr., 1; aff'g 1 Abb. Pr., 466.

lord must prove a strong case to get the benefit of his objection.(*q*)

§ **952**. In Gordon v. Smart,(*r*) where a contract to grant a building lease had been entered into, and the plaintiff, claiming under this contract, had erected a brewhouse on part of the ground, which, it was contended, would be an injury to the adjoining property of the lessor; this was argued, but unsuccessfully, to be a reason for refusing specific performance, Leach, V. C., saying that it was not necessarily a nuisance: he left open the question whether, if it had in itself been a nuisance, that would have been a defense in such a suit.

§ **953**. It seems that under the Irish tenantry acts, and perhaps even independently of them, the breach by the tenant of covenants in the lease will not be a bar to specific performance of a covenant for renewal.(*s*) Certainly they will not so operate unless they be gross and perhaps also willful.(*t*)

3. *Where specific performance was granted and the question of breach of covenants left for decision at law.*

§ **954**. Where the Court of Chancery found such a conflict of evidence as left it in doubt whether there had been such a breach of covenant as to render it proper and expedient to refuse specific performance on that ground, it took the course of directing the lease to bear the date of the contract, or a date anterior to the alleged breaches, and required from the plaintiff an undertaking to admit in any action which might be brought under such lease for the recovery of the demised property, or upon any breaches of covenant to be contained in such lease, that such lease was executed on the the day on which it should bear date.

§ **955**. This practice was first introduced by the case of Pain v. Coombs :(*u*) it was followed by the Court of Appeals in Lillie v. Legh :(*v*) it was discussed, adopted and approved in Rankin v. Lay,(*w*) and had thus become the well-established practice of the Court of Chancery.

(*q*) Mundy v. Jolliffe, 5 My. & Cr., 167, 177.
(*r*) 1 S. & S. 66.
(*s*) Trant v. Dwyer, 2 Bli. N. S., 11. See Thompson v. Guyon, 5 Sim., 65; supra, §
(*t*) Hare v. Burges, 5 W. R., 585.
(*u*) 1 De G. & J., 34 (S. C. before Stuart V. C., 3 Sm. & G., 449).
(*v*) 3 De G. & J., 204. Cf. Powell v. Lovegrove, 8 De G. M. & G. at p. 365.
(*w*) 2 De G. F. & J., 65. See too Poyntz v. Fortune, 27 Beav., 393; Brown v. Marquis of Sligo, 10 Ir. Ch. R., 1; Cartan v. Bury, id., 387.

§ **956**. It would be presumptuous to inquire whether the court did wisely in directing deeds to bear false dates,(*x*) or in requiring persons to admit as a fact that which was not a fact. But it may be allowable to rejoice in the expectation that, under the improved judicature now in existance, no such decrees as those last referred to will be made. The high court will probably decide the whole case at once.

§ **957**. Other cases have arisen which illustrate the general principle, in cases not arising out of contracts for leases.

Where an estate was sold upon the condition, amongst others, that immediate possession should be given, and in course of disputes which subsequently arose about the title, the vendors tendered the purchaser his deposit, demanded back possession, drove the purchaser's stock off the estate, and gave notice to the tenants not to pay the rent to him,—this was conduct inconsistent with the condition of the sale, and was held to operate as a bar to specific performance at the suit of the vendors.(*y*)

§ **958**. In another case it was thought by Lord Cranworth doubtful whether a bill could be maintained for the specific performance of an award after the plaintiff had taken proceedings to set it aside.(*z*)

§ **959**. Where a vendor has given notice of his intention to resell under the contract, it was held that he had precluded himself from afterwards seeking for specific performance.(*a*)

§ **960**. Again, a railway company cannot first enter into a contract for the purchase of land, then take proceedings under their compulsory powers in a way which assumes that there is no subsisting contract, and then fall back upon and seek to enforce the original contract.(*b*)

§ **961**. Still it is not every breach of good faith which will prove a bar. Where the plaintiff has been guilty of small breaches of good faith, for which the defendant had a remedy in his own hands, and where, if the interference of the court were refused, the plaintiff would be without any

(*x*) The fraudulent making of a deed with a false date is, or may be, forgery. Reg. v. Rixson, L. R., 1 C. C. R., 200

(*y*) Knatchbull v. Grueber, 1 Mad., 153; S. C. Mer. 124.

(*z*) Blackett v. Bates, L. R. 1 Ch., 117; reversing S. C. 2 H. & M., 270.

(*a*) Boyou v. Paul, 28 L. J. Ch., 555.

(*b*) Bedford and Cambridge Railway Co. v. Stanley, 2 J. & H. 746.

adequate remedy, such breaches of good faith have been held not to be a bar to relief, though they affect the costs.(*c*)[1]

(*c*) Holmes v. Eastern Counties Railway Co., 3 Jur. N. S., 737; cf Besant v. Wood, 12 Ch. D., 605.

[1] *Tender, in cases where specific performance is demanded*] In order that an action may be sustained by the vendor he must show that he has made a tender of a good title and an offer to fulfill the conditions on his part. Hodges, *ex parte*, 24 Ark., 197; Mix v. Beach, 46 Ill., 113; McIlugh v. Wells, 39 Mich., 175; Sowle v. Holdridge, 63 Ind., 213. Before a conveyance can legally be required, the vendee must make a good tender of the purchase money. Huff v. Jennings, Morris (Iowa), 454; Heuer v. Rotkowski, 18 Mo., 216; Beebe v. Dowd, 22 Barb., 255; Goodale v. West, 5 Col., 339; Bearden v. Wood, 1 A. K. Marsh., 450; Greenup v. Strong, 1 Bibb., 590; McComas v. Earley, 21 Gratt., 29; Irwin v. Blakesley, 67 Pa. St., 24; Bislinger v. Kitts, 6 Barb., 273; Tanner v. Peck, 1 Barb.'s Ch., 549; Lansing v. Thompkins, 45 Barb., 308; Chase v. Hogan 3 Abb. Pr. (N. S.), 59. A tender of the purchase money must not only be made, but it must be kept good, in order to stop the running of interest. The vendee must not use the money for other purposes. Bissell v. Heyward, 6 Otto., 580. When the purchase money was tendered, the estate was worth more than the price agreed upon, and the vendor refused to convey. After waiting until the value had considerably depreciated he sought the aid of equity to compel specific performance. Held, that he could not obtain it. Tobey v. Foreman 79 Ill., 489. The plaintiff, in an action for specific performance, showed no offer of compliance with his part of the agreement, and no excuse therefor, for a period of twenty-one or twenty-two months. Held, that he was not entitled to a decree. Green v. Covilland, 10 Cal., 317.

Examples of sufficient tender] As to U. S Treasury notes, see Davis v. Parker, 14 Allen, 94. Where money is payable in installments, see Rogers v. Taylor, 40 Iowa, 193; Blackner v. Phillips, 67 N. C., 340. There was an allegation that a tender of payment had repeatedly been made, and that the plaintiff had at all times been and still was ready and willing to pay. Held, that the tender should have been stated with greater particularity. Duff v. Fisher, 15 Cal., 375; Hart v. McClellan, 41 Ala., 251. In Englander v Rogers, 41 Cal., 420, the allegation of tender by the plaintiff was as follows: that he "has been ready and willing during all the time aforesaid, and has offered to accept and take said conveyance, pursuant to said agreement, and to pay the balance of said purchase money." This was held not sufficient. "To constitute a valid tender in such a case, the party must have the money at hand, immediately under his control, and must then and there not only be ready and willing, but produce and offer to pay it to the other party on the performance by him of the requisite conditions." Crockett, J. See, also, Strong v. Blake, 46 Barb., 227. Where there has been a tender of the purchase money, and a refusal to convey, it need not be shown that the tender was kept good. Allen v. Atkinson, 21 Mich., 351; King v. Ruckman, 21 N. J. Eq., 599; McDonald v. Kimbrell, 3 Iowa, 335.

CHAPTER XXII.

OF NON-PERFORMANCE OF CONDITIONS.

§ 962. A contract may be originally conditional, and contingent upon the performance of some act or the happening of some event. Where that has occurred, the contract becomes absolute, and rests on the same footing for all purposes as if it had been originally made positively and without reference to any contingency.(*a*) But until it has thus become absolute, no person can be entitled to call for its performance.(*b*) Where, therefore, the contract is in its origin conditional, it may afford a ground of defense that the condition has not been performed.[1]

(*a*) Per Lord Romilly, M. R., in Regent's Canal Co. v. Ware, 23 Beav., 586

(*b*) Scott v. Corporation of Liverpool, 1 Giff., 216; 3 De G. & J., 334; Cf. Abbott v. Blair, 8 W. R., 672; Douglas v. Sidmouth Railway and Harbor Co., 14 W. R. 361.

[1] Where A. signs an agreement to do certain acts, on the performance of certain conditions precedent by B., and B. performs those conditions, equity will compel a specific performance of the agreement by A. Lanning v. Cole, 3 Green's Ch., 229. But a party so seeking to obtain the benefit of a conditional agreement must show not only that he accepted the offer made, but also that he faithfully performed the condition. Dilly v. Barnard, 8 Gill. & J., 170. And, therefore, at law, where one party covenants to give a deed on a certain day, and the other covenants to pay money on the same day, neither can maintain an action against the other, until he has performed or tendered performance on his part. Green v. Reynolds, 2 John., 207; Jones v. Gardiner, 10 id., 266; Hardin v. Kreitsinger, 17 id., 293; Robb v. Montgomery, 20 id., 15; Gazely v. Price, 16 id., 267; Robertson v. Robertson, 3 Rand., 68; Northrup v. Northrup, 6 Cow., 296; Meriwether v. Carr, 1 Blackf., 415; Bailey v. Clay, 4 Rand., 346; see Gibbs v. Champion, 3 Ham., 335. And in equity, where one contracts for a lease, upon certain stipulations to be performed by him, and enters upon the lands, but fails to perform such stipulations, he cannot compel the other party to the contract, or his assignee, to make a lease to him. Jones v. Roberts, 6 Call, 187; Harvie v. Banks, 1 Rand., 408. Chancery never relieves against the breach of conditions precedent, although it may against conditions subsequent. The reason of this is obvious. In cases of conditions precedent no estate can vest until the condition be performed; and, therefore, any claim for relief must be without foundation. But in cases of conditions subsequent, the estate, or interest, vests in the first instance, subject to be divested on non-performance or breach of the condition. Wells v. Smith, 2 Edw.'s Ch., 78; Chipman v. Thompson, Walk.'s Ch., 405; Preston's Leg., 103, ch. 5. Therefore, a corporation will not be permitted to enforce payment of stock, for which its agents obtained subscriptions, on conditions with which it refuses to comply. Turnpike Co. v. Churchill, 6 Monr., 427. But where there has been a breach of a condition subsequent, and compensation can be made, a court of equity will grant relief. Walker v. Wheeler, 2 Conn., 299; De Forrest v. Bates, 1 Edw.'s Ch., 394; Chipman v. Thompson, Walk.'s Ch., 405. And, in accordance with this principle, it has been held that, where by the terms of a lease, it is to cease and determine upon a breach of any of the covenants therein, and, by a clause in the lease, it is provided that the lessor may re-enter

§ **963**. A case before Lord Romilly, M. R., may be cited as an illustration of this obvious principle. The defendants agreed to take a lease of a public house from the plaintiff, provided the retail license was obtained, and the plaintiff agreed to use his utmost efforts to obtain this license. The defendant entered into possession to qualify himself as a publican for the license and obtained a license from the justices, but under compulsion of the justices and threat of refusal. he gave to the justices a verbal promise that no excisable liquor should be sold for consumption on the premises. It was held that the condition was not performed and specific performance was refused.(*c*)

§ **964**. A contract may be conditional either by express words of condition, or because the court, upon a consideration of its terms, gathers that to have been the intention of the contracting parties. This is, of course, a question to be decided on the terms of each contract. It will, therefore, be sufficient briefly to allude to two or three cases of practical moment.

§ **965**. In the care of contracts by railway companies, the question has sometimes arisen how far they are conditional on the formation of the railway. In one case, where a company before incorporation contracted with a landowner, the contract provided for a bridge over the railway, a certain deviation of the line, and other works entirely dependent on its formation, and also for the payment of £4,500 as purchase money for certain lands to be taken by the company, and for consequential damages to the landowner's estate. The contract was expressly conditional on the act passing. It passed but the railway was abandoned, and the time for

(*c*) Modlen v. Snowball, 29 Beav., 641, affirmed 31 L. J. Ch., 44; 10 W. R., 24.

for a breach of the same covenants, the lease is voidable only upon such a breach, and not void. (Walworth, Ch.) Stuyvesant v. Davis, 9 Paige, 427. To create a condition precedent or subsequent no precise technical words are required. The construction must always be found upon the intention of the parties. If the act or condition required does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may be as well done after as before the vesting of the estate, or, if from the nature of the act to be performed, and the time required for its performance, it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act, after taking possession, then the condition is subsequent. Underhill v. Saratoga and Washington R. R. Co., 20 Barb., 455. Therefore, a conveyance to a railroad corporation upon the express condition that the company should construct its railroad within the time prescribed by the act of incorporation, is a grant upon a condition subsequent, and not precedent. Nicoll v. New York and Erie R. R. Co, 2 Kernan (N. Y), 121.

taking the lands had expired. Nine-tenths of the contract, as Knight Bruce, L. J., remarked, had become impracticable by reason of the abandonment of the railway: and the Lords Justices, though not deciding the point, evidently inclined to the opinion that the contract was conditional, not only on the passing of the act, but on the making of the railway.(*d*) And in the subsequent case of Lord James Stuart v. London and North-Western Railway Co.,(*e*) Lord Cranworth, L. J., expressed a similar opinion. These cases have been doubted,(*f*) but rather on the point of jurisdiction than of the construction of the contracts: and they have certainly received great support from the case of Gage v. Newmarket Railway Co.(*g*) There the company had covenanted with the plaintiff that, in the event of a bill for extending their powers being passed in the then present session, the company should, before they should enter on any part of the plaintiff's land, pay him £4,900 purchase money for any portion of his land, not exceeding forty-three acres, which the company might require to take, and £7,100 as landlord's compensation for damages arising by the severance thereof. It was held that the covenant was not for the payment of an absolute sum as a consideration for the plaintiff's withdrawing his opposition, but a payment as purchase money and compensation for services, which could not be due when no land was required or taken, and no severance affected for which compensation could arise. In the case of the Scottish North-Eastern Railway Co. v. Stewart(*h*) the House of Lords arrived at a similar conclusion upon the contract there in question.

§ **966**. The performance of conditions precedent may of course be waived by the persons entitled to their performance ;(*i*) but any waiver to be binding must be made intentionally and with a knowledge of the circumstances.(*j*)[1]

(*d*) Webb v. Direct London and Portsmouth Railway Co., 1 De G. M. & G., 521, reversing S. C. 9 Ha., 129.

(*e*) 1 De G. M. & G., 721. This case in the court below is reported, 15 Beav., 513. See, also, 5 H. L. C., 351.

(*f*) Hawkes v. Eastern Counties Railway Co., 1 De G. M. & G., 737; S. C. 5 H. L. C., 331.

(*g*) 18 Q. B., 457. See, also, Edinburgh, Perth and Dundee Railway Co. v. Philip, 2 Macq., 514

(*h*) 3 Macq., 382.

(*i*) Beatson v. Nicholson, 6 Jur., 620.

(*j*) Earl of Darnley v. London, Chatham, and Dover Railway Co., L. R. 2 H. L. 43 (S. C., 1 De G. J. & S., 204, 3 id. 24.

[1] *Contract assigned before payment.*] The purchaser assigned his contract before payment became due, and the assignee failed to pay before the vendor commenced his action for specific performance. Held, that it was proper for the latter to tender a conveyance to the original purchaser. Corbus v. Leed, 69 Ill., 205.

CHAPTER XXIII.

OF THE INCAPACITY OF THE DEFENDANT TO PERFORM HIS PART OF THE CONTRACT.

§ **967**. There are certain cases in which the contract is construed to be conditional, on individual capacity, or on the continued existence of some state of facts or thing. "Contracts for personal service, for matters dependent on personal capacity, as to write a book or paint a picture, are conditional on the continuance of the ability, mental or corporeal, to perform them."(*a*) So, again, where from the nature of the contract it appears that the parties contracted upon the footing of the existence at the time of performance of some particular specified thing, and there is no express or implied warranty that the thing shall exist, a condition is implied that the party to do the act shall be excused, in case before breach performance becomes impossible by the perishing of the specified thing without the default of the party. This principle has been applied to a contract to let a music hall, which was destroyed by fire before the day arrived;(*b*) and to a contract to sell 200 tons of potatoes grown on particular land.(*c*)

§ **968**. All these contracts, being conditional and not positive, are not within the rule that, where there is a positive contract to do a thing not illegal, the contractor must perform it or pay damages for not doing it, though it has become impossible. On such contracts no action can be maintained, whether for damages or specific performance.

§ **969**. But in contracts positive and not conditional, the incapacity of the defendant to perform his part of the contract, whilst it furnishes no answer to an action for damages,(*d*) affords a ground of defense against specific performance.(*e*) This contention does not, like that in the case

(*a*) Per Bramwell B., in Hall v. Wright, El. B. & E., 778; Poussard v. Spies, 1 Q. B. D., 410, 414.
(*b*) Taylor v. Caldwell, 3 B. & S., 826.
(*c*) Howell v. Coupland, 1 Q. B. D., 258. See, also, Appleby v. Myers, L. R. 2 C. P. 651.
(*d*) Hall v. Wright, El. B. & E., 746; Brown v. Royal Insurance Co., 1 El. & El., 853.
(*e*) Per Lord Hardwicke in Green v. Smith, 1 Atk., 573.

of conditional contracts, rest upon the nature or terms of the contracts, nor, like that grounded on the incapacity of the plaintiff to perform his part, rest upon any principle of justice that operates in favor of the defendant, but is based upon the necessity of the case arising out of the nature of the relief sought.[1]

§ **970**. Where a bill was filed against the provisional committee of a projected railway company for the specific performance of a contract to deliver to the plaintiff a certain number of scrip certificates; there being no allegation that the defendants had any scrip which they could deliver, but a statement from which the contrary might rather be inferred, a demurrer was allowed on the ground that the bill did not show any capacity in the defendants to perform the contract.(*f*) So where a defendant showed that he had sold the property in question for a valuable consideration to a third party, no performance could be enforced:(*g*) and so again, assuming that a covenant to produce deeds can be obtained by way of specific performance of a covenant for further assurance, it seems that the court will not attempt so to carry it into effect where the deeds are not in the proposed covenantor's power.(*h*)[2] So again a contract by

(*f*) Columbine v. Chichester, 2 Ph., 27; Ferguson v. Wilson, L. R. 2 Ch., 77.

(*g*) Denton v. Stewart, 1 Cox, 258, 17 Ves., 276 n.

(*h*) Hallett v. Middleton, 1 Russ, 243.

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[1] Courts of equity never enforce the specific performance of an agreement where the decree would be a vain or imperfect one. Tobey v. The County of Bristol, 3 Story, 800. But although the incapacity of the defendant will defeat a decree for specific performance, yet, where a party has put it out of his power to perform specifically, a bill filed for that purpose will be retained, and an equivalent in damages awarded, to be assessed on reference to a master, or to a jury upon an issue of *quantum damnificatus*, according to circumstances. Woodcock v. Bennett, 1 Cow., 711.

[2] *Who must prepare the deed; abstract of title.*] In many of the States the vendor must cause the deed to be ready for delivery. This has been expressly held to be the rule in California, Morgan v. Stearns, 40 Cal., 434; Illinois, Buckmaster v. Grundy, 1 Seam., 310; Iowa, Carson v. Lucore, 1 Greene (Iowa), 33; Powers v. Bridges, 2 id., 235; Young v. Daniels, 2 Iowa, 126; Maine, Hill v. Hobert, 16 Me., 164; Massachusetts, Tinney v. Ashley, 15 Pick., 546; Dana v. King, 2 id., 155; Hunt v. Livermore, 5 id., 395; Brown v. Bellows, 4 id., 179; Minnesota, St. Paul Division v. Brown, 9 Minn., 157; Mississippi, Standifer v. Davis, 13 Sm. & Marsh., 48; New Hampshire, Fairbanks v. Dow, 6 N. H., 266; New York, in an executory contract, the vendor of real property must cause a sufficient deed to be prepared, which must be tendered to the vendee, before such vendor can apply to a court either for a rescission or specific performance; McWilliams v. Long, 32 Barb., 194; Caup v. Morse, 5 Den., 161; Wells v. Smith, 2 Edw., 78; Green v. Reynolds, 2 John., 207; Northrup v. Northrup, 6 Cow., 296; Hudson v. Swift, 20 John., 27; Parker v. Parmlee, 20 id., 130; Slocum v. Despard, 8 Wend., 615; Johnson v. Wygant, 11 id., 48;

directors to accept shares in payment of calls being legally impossible of performance cannot be enforced.(*i*) And where a charitable corporation, which had no power of selling except under the land clauses act, contracted to sell land without having the price settled in the manner prescribed by the act, the court refused to decree specific performance.(*j*)

§ **971**. It is immaterial for this purpose that the defendant is the author of his own incapacity. "Put the extreme case," said Kindersley, V. C., "of a vendor burning a title deed: the court could not make a decree that he should deliver it up, and be imprisoned if he does not."(*k*)

§ **972**. It is not necessary to the specific performance of a contract, that it should be one which the parties at the time of entering into it had the power of carrying into effect, nor one with regard to which it depends on themselves alone whether they would ever be able to perform it. For where a party enters into a contract without at the time having the power of performing it and afterwards acquires that power, he is bound to perform the contract he entered into.(*l*) Therefore a defendant cannot object at an early stage of an action for specific performance that he he has not the interest he has contracted to sell, as he cannot be permitted to say that he did not mean to acquire that interest.(*m*)[1] And so where a defendant had contracted to give a certain indemnity to be secured on real estate, and alleged that he had not real estate of sufficient value, and contended that the plaintiff ought to accept a personal indemnity, it was held that he was bound to purchase real estate of sufficient value.(*n*)

(*i*) Ellis v. Colman, 25 Beav., 662. See, also, Seawell v. Webster, 29 L. J. Ch., 71.
(*j*) Wycombe Railway Co. v. Donnington Hospital, L. R. 1 Ch., 268.
(*k*) In Seawall v. Webster, 29 L. J. Ch., 73.
(*l*) Holroyd v. Marshall, 10 H. L. C., 191, 211; Crane v. Mitchell, 15 L. J. Ch., 287.
(*m*) Per Lord Eldon in Browne v. Warner, 14 Ves., 412.
(*n*) Walker v. Barnes, 3 Mad., 247.

Fuller v. Hubbard, 6 Cow., 13; Connelly v. Pierce, 7 Wend., 129; Pennsylvania, Switzer v. Hammel, 3 Serg. & Rawle, 228; South Carolina, Prothro v. Smith, 6 Rich.'s Eq., 324. In Arkansas the vendee must cause the deed to be prepared and must tender it to the vendor. This is the rule in England. Byers v. Aiken, 5 Pike, 419. In Alabama the rule is the same as in England and Arkansas, and in this State the vendor, when required, must furnish an abstract of his title. Chapman v. Lee, 55 Ala., 616.

[1] See the cases of Collins v. Carr, Freem., 5; Greenaway v. Adams, 12 Ves., 401; Coffin v. Cooper, 14 id., 205; and Hull v. Vaughan, 6 Price, 163, in support of the rule.

§ **973**. The same principle is exemplified in a case which was decided in the 34th year of Charles II. During the civil wars, the then Duke of Newcastle had gone abroad, and whilst he was thus absent, the defendant, who was his heir apparent, without authority from the then Duke, sold and conveyed to the plaintiff certain estates of the Duke, and received the purchase money, and applied it for the benefit of the family. The defendant having subsequently succeeded to the dukedom and the estates in question as heir, was, by Lord Nottingham, held bound to make good his sale, and was decreed to do so accordingly.(*o*) At the time of the contract, specific performance would have been impossible on the part of the defendant, but it had subsequently become possible by the devolution of the estate contracted to be sold.

§ **974**. On the same principle, the court will not in all cases consider as void, contracts, whether by private persons or companies, which require the interposition of the legislature before they can be carried into effect, and accordingly will in the meanwhile protect the property in issue.(*p*)

§ **975**. With regard to real estate, the statute 32 Hen. VIII., c. 9, prevents the sale of a pretended right to land by a person out of possession; but if a person, instead of selling a pretended right, contracts on a certain future day to convey an estate, and he is on the day possessed of it, the contract appears not to be within the operation of the statute, and to be binding on both parties.(*q*)

§ **976**. And so also with regard to goods, the legality of contracts for the sale of such property not at the time in the possession of the vendor is now well established :(*r*) so that, notwithstanding an opposite decision of Lord Macclesfield,(*s*) such a contract would now probably be enforced, if in other respects it fell under the jurisdiction of the court.(*t*)

§ **977**. As the consent of a third party is, or may be, a thing impossible to procure, a defendant who has entered

(*o*) Clayton v. Duke of Newcastle, 2 Cas. in Ch., 112.

(*p*) Great Western Railway Co. v. Birmingham and Oxford Junction Railway Co., 2 Ph., 597; per Lord St. Leonards in Hawkes v. Eastern Counties Railway Co., 1 De G M. & G., 756; Devenish v. Brown, 26 L. J. Ch., 23; 4 W. R., 783 (Wood, V. C.); Frederick v. Coxwell, 3 Y. & J., 514. As to contracts requiring proposed legislation to render them legal, see Mayor of Norwich v. Norfolk Railway Co., 4 El. & Bl., 397.

(*q*) De Medina v. Norman, 9 M. & W., 829; and see further, as to this statute, supra, § 211.

(*r*) Hibblethwaite v. McMorine, 5 M. & W. 462.

(*s*) Cuddee v. Rutter, 5 Vin. Abr , 538, pl. 21.

(*t*) Holroyd v. Marshall, 10 H. L. C., 191.

into a contract to the performance of which such consent is necessary, will not, in case such consent cannot be procured, be decreed to obtain it, and thus perform an impossibility.(*u*)

§ **978**. Where the husband, or husband and wife, have entered into a contract to sell the estate of the wife, the Court of Chancery used formerly to decree the husband to procure his wife's consent, and in default commit him to goal until she yielded.(*v*)[1] But the absurdity of such a

(*u*) Howell v. George, 1 Mad., 1; Grey v. Hesketh, Ambl., 268; S. C. 3 Burn. Eccl. Law, 336, 5th ed. See, also, Weatherall v. Geering, 12 Ves., 511, Marsh v. Milligan, 3 Jur. N. S., 979 (Wood, V. C.); Beeston v. Stutely, 6 W. R., 206; 27 L. J. Ch., 156; Meara v. Meara, 8 Ir. Ch. R., 37; and Willmott v. Barber, 15 Ch. D., 96 Distinguish Leitch v. Simpson, 1 R., 5 Eq., 613.

(*v*) Barrington v. Horn, 5 Vin. Abr., 547 pl. 35; S. C. 2 Eq. Cas. Abr., 17, pl. 7; Hall v. Hardy, 3 P. Wms., 187; Daniel v. Adams, Ambl., 495; Morris v. Stephenson, 7 Ves., 474.

[1] Wheeler v. Newton, 2 Eq. Cas. (Ala.), 44; Colvert on Par., 269. A husband and wife contracted, in writing, to sell the land of the wife; the separate acknowledgment of the wife was had. Held, that an action would lie for specific performance. Darkel v. Hunter, 61 Pa. St., 382. See *contra*, Frarey v. Wheeler, 4 Oregon, 190. Where the conveyance made by a married woman is void she should be made a party. Stainsbury v. Pope, 4 Bibb. (Ky.), 492. Where the husband is not named the action may be brought by the wife alone. Stampoffski v. Hooper, 75 Ill., 241; see, in this connection, Harper v. Whitehead, 33 Ga., 138. A bill was filed by a husband and wife to compel specific performance of a contract to convey land to the wife; pending the action the wife died. Held, that their children must be joined, or an order to proceed in the name of the survivors in order that a decree could be entered on the merits. Hand v. Jacobus, 19 N. J. Eq., 70. Where the wife is a tenant for years she may, with her husband, sustain an action for specific performance against the lessor. Bain v. Bickett, 1 Cinc., 161. When a wife was not a party to a contract for the sale of land she cannot be compelled to join in the conveyance of the same, and she is not a proper party to an action for specific performance. Richmond v. Robinson, 12 Mich., 193. A husband contracted for the sale of his wife's land and described it as his. Held, that the wife, after his death, was not entitled to a decree of specific performance against the purchaser for her own benefit. Hoover v. Calhoun, 16 Gratt., 109. The wife of a surviving partner need not be joined as a party. Galbraith v. Gedge, 16 B. Mon., 631. An action will lie to change the separate estate of a married woman under her agreement to purchase. Knowles v. McEamly, 10 Paige's Ch., 342; Hinckley v. Smith, 51 N. Y., 21; Berry v. Cox, 8 Gill., 466; Ballin v. Dillage, 37 N. Y., 35; N. Y. Rev. St. (6th ed.), vol. 3, page 160, § 82. It cannot be maintained against her personally, however. Francis v. Wizzel, 1 Mad., 258. The engagement must be made on the credit of her separate estate. Johnson v. Gummius, 16 N. J. Eq., 97; Harrison v. Stewart, 18 id., 451; Hinckley v. Smith, 51 N. Y., 21. In New York a married woman acts as a *feme sole*, her liability, when she binds herself to an executory contract, does not depend upon the existence of special circumstances, but is governed by the ordinary rules by which the liability of persons *sui juris* upon their contracts are determined. Cushman v. Henry, 75 N. Y., 103; Rev. S. C., 44 N. Y. Sup. Ct., 93. In Iowa the wife can control her own property, vindicate her individual rights and bind herself by contract as fully and to the same extent as her husband. Spafford v. Warren, 47 Iowa, 47. In South Carolina the husband is a formal and not a substantial party in actions against the wife on her individual contracts, other than for necessaries. Ross v. Linden, 12 S. C., 592. Equity for many purposes treats the husband and wife as capable of concocting with each other; such contracts will sometimes be enforced, even as against the creditors of the husband. Campbell v. Galbreath, 12 Bush. (Ky.), 459. A husband and wife, in a con-

course is obvious; because the Court of Chancery was thus putting all the compulsion it could upon the wife to induce her to do an act, of which the essence is that it is done without compulsion; the Court of Chancery was distressing her to give her consent, whilst the court of common pleas was examining her to see that she was acting from free will alone; and it is now accordingly established that the court will not interfere specifically to perform contracts where a wife's consent is requisite, and she refuses to give it (*w*) But in cases of contracts by the husband and wife, it will enforce the contract against the husband, with compensation for the interest which the wife's refusal has prevented the plaintiff from acquiring.(*x*)

§ **979**. It must not, however, be misunderstood that the incapacity of the defendant to perform a contract literally and exactly in all its parts will enable him to refuse to perform it in substance. The plaintiff has in many cases the right to call on the defendant to perform the contract as best he can, though the defendant's incapacity to perform it fully might be a bar to him, if he filled the position of plaintiff. All the cases in which a plaintiff enforces a contract so far as the defendant can perform it and obtains compensation from him for the part unperformed are instances of this.(*y*) Some other cases of the same sort may be mentioned.

§ **980**. If two tenants in tail in common were to contract

(*w*) Bryan v. Wooley, 1 Bro. P. C., 184; Emery v. Wase, 8 Ves., 505; Frederick v. Coxwell, 3 Y. & J., 514; Howell v. George, 1 Mad., 1; Buck v. Whelley, in D. P. 1 Mad., 7 n.; Martin v. Mitchell, 2 J. & W., 413, 425; per Lord Mansfield, C. J., in Davis v. Jones, 1 N. R., 269.

(*x*) Barnes v. Wood, L. R. 8 Eq., 424; Castle v. Wilkinson, L. R. 5 Ch., 534; infra, § 1228, 1232.

(*y*) See Part V., chap. ii., § 1222, et seq.

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tract founded upon a proper consideration, bound themselves to execute a mortgage upon the separate estate of the wife. Held, that a court of equity will enforce such contract, and that the estate is liable for the debt intended to be served. Hall v. Hume, 37 Md., 500. A married woman purchased real estate and gave her notes, secured by mortgage. Held, that the vendor could hold it in equity for the purchase money. This was in a case where no personal judgment could be given upon the notes. Pemberton v. Johnson, 46 Mo., 342; Warmick, 40 Pa. St., 140; see, also, Beame v. McGee, 46 Ala., 170; Phillips v. Graves, 20 Ohio St., 371. In Massachusetts the written assent of the husband is required to make a wife's contract binding; it may then be specifically enforced. Boker v. Hathaway, 5 Allen, 103; Townsley v. Chapin, 12 id., 479. Where a married woman conveyed her real property for a valuable consideration and the vendee made permanent improvements thereon. Held, that although her contract, entered into during coverture, was incapable of specific enforcement, still the value of the improvements, less the rent of the premises, must be a charge upon the land until paid. Frarey v. Wheeler, 4 Oregon, 190.

to sell an estate and one of them died before completion, the issue in tail of the one dying would not be bound by the contract; but it seems that the purchaser might, if he chose, sue the survivor for a conveyance of his moiety on payment of a half of the purchase money.(*z*)

§ **981**. So in Carey v. Stafford,(*a*) in the Exchequer in 1725, where a man executed a deed affecting to convey lands therein described of the yearly value of £22 to his servant, and no such lands existed, the court compelled him to convey lands of equal value.

§ **982**. And so if a copyholder were to contract to grant a lease for a longer term than the custom allowed, he would, it seems, be compelled to effectuate his contract in substance, by from time to time executing leases for such terms as he could, till he had made up the term contracted for.(*b*)

§ **983**. Errington's case,(*c*) though not on a specific performance, is another illustration of this principle. He had contracted for £9,000 to build a bridge over the Tyne, and to maintain it for seven years, and had entered into a bond in that sum conditioned for performance of the contract. The bridge was built, but thrown down by a flood; and it was found that no bridge on that site could stand. Thereupon he filed his bill for relief from the bond; and upon his building a bridge upon a neighboring site where it could stand, and submitting to an issue of *quantum damnificatus* by the change of site, he was relieved from the penalty of the bond.

§ **984**. Where a contract is in its original form obnoxious to difficulties on the score of illegality, but can, nevertheless be lawfully performed in substance, the court will so model it as to effectuate this purpose. Thus it having been made by statute illegal to contract for the tenant to pay the rent-charge, a contract for a lease, stipulating that the tenant should pay a certain sum for rent and also the rent-charge, may be carried into effect by the court by means of a lease reserving as rent the two sums in the contract treated respectively as rent and rent-charge.(*d*)

§ **985**. But such modelling can only apply to matters of

(*z*) Per Lord Hardwicke in Att.-Gen. v. Day, 1 Ves. Sen., 224.
(*a*) 3 Sw., 427 n.
(*b*) Paxton v. Newton, 2 Sm. & Gif., 437.
(*c*) Per Lord Redesdale in Davis v. Hone, 2 Sch. & Lef. 351; Errington v. Aynesly, 2 Bro. C. C., 341.
(*d*) Carolan v. Brabazon, 3 Jon. & L., 200.

form. So where an incumbent was under a statute able to grant a lease with rent payable half-yearly, the court declined to compel the lessee to take a lease with a reservation of rent payable quarterly: the mode of reservation of rent was held to be an essential part of the contract.(*e*)

§ **986**. The court will probably be anxious to execute a contract *cy près*, where by subsequent legislation a contract originally valid may have become invalid in part. Thus where a dean and chapter, prior to the disabling statute of 13 Eliz., covenanted for the renewal of a lease for ninety-nine years, and the plaintiff brought his bill asking for a renewal for such term as the corporation could grant under the statute, it was ultimately decided by the House of Lords, in accordance with the opinion of Jekyll, M. R., but overruling the judgments of Lord King, Lord Raymond, C. J., and Price, J., that the plaintiff was entitled to this *cy près* relief.(*f*)

§ **987**. It seems that in some cases in which the contract would be incapable of being specifically enforced in its very terms for other reasons than illegality, it may be executed by the court *cy près* if such a plan is feasible. In one case there was a contract entered into by the defendants within two years to procure the heir-at-law of A. B. to convey certain estates to the plaintiffs, or within the same period to petition the House of Lords for, and to use their utmost endeavors to procure, an act of Parliament for substituting a trustee in place of the heir, in case such heir could not be found, or there was no heir: on a bill filed for the performance of this contract, the court decreed the defendants to allow their names to be used in an application to Parliament for the act.(*g*) A contract by a person to use his utmost endeavors seems to be one which the court could not specifically execute.

§ **988**. In some railway cases, the court has shown a great inclination to regard what it considers as a substance of the contract. In one case, company A. contracted with the plaintiff for the purchase of the lands required for their proposed line, and for the withdrawal of his opposition in consideration of £20,000 to be paid to him, in case the bill

(*e*) Jenkins v. Green (No 2), 27 Beav., 440. Paul's, Sel. C. in Ch., 66 (Nov. 1726); supra, § 39

(*f*) Betesworth v. Dean and Chapter of St.

(*g*) Frederick v. Coxwell, 3 Y. & J., 514.

should pass into law: there was a rival company B., which would require different lands of the plaintiff: by agreement, made between the two companies during the proceedings before the committee of the commons, it was agreed that a reference should be made as to which of the two lines should be carried into effect, and that the successful company should take to all the engagements of the other. The line of company B. was approved, and company A.'s bill was accordingly withdrawn: company B. refused to pay the plaintiff the £20,000, alleging, amongst other things, that it was conditional on the bill of company A. passing, and that the lands required were not those contracted for: but on a bill filed by the plaintiff against them, their demurrer was overruled by Shadwell, V. C., and Lord Cottenham.(*h*) In a subsequent case, however, the same vice chancellor considered the passing of a bill of an amalgamated company sufficiently distinct from the passing of the bill of one of the companies to relieve the amalgamated company from a contract binding in case of the bill of the one company passing.(*i*) The decree was affirmed by Lord Cottenham, but on a different ground.(*j*)

§ **989**. Where a contract is in the alternative, so as to give an election to the party to perform it, and one of the alternatives is at the time of the contract, or subsequently becomes, impossible, the question arises how far the contracting party is bound to the performance of the alternative that remains possible. The cases seem to divide themselves into (1) those where one alternative is impossible at the time of the contract, (2) where it becomes so subsequently to the contract, but before election, by the act of God, or (3) by the act of the other party to the contract, or (4) by the act of a stranger, and (5) those cases where the impossibility arises after election. The different cases are briefly considered.

§ **990**. (1) Where at the time of the contract one alternative is impossible or void, the party to execute the contract is bound to the performance of the other alternative.(*k*) So

(*h*) Stanley v. Chester and Birkenhead Railway Co., 9 Sim., 264; S. C. 3 My. & Cr., 773.

(*i*) Greenhalgh v. Manchester and Birmingham Railway Co., 9 Sim., 416

(*j*) 3 My. & Cr., 784. See further, as to the results of amalgamation, Earl of Lindsey v. Great Northern Railway Co., 10 Ha., 664; King v. Accumulative Assurance Co., 3 C. B. N. S., 151; Kearns v. Leaf, 1 H. & M., 681.

(*k*) Com. Dig. Condit. K., 2; Wigley v. Blackwal, Cro. Eliz., 780.

where the condition of a bond was to pay a certain sum, or render in execution a person who had been previously discharged, and the court held the latter alternative illegal and void, it was decided that the obligor was bound to perform the other, and that not having done so, the bond was forfeited.(*l*) And where an award directed that a sum of money should be paid or be secured to be paid, and did not define the security to be given, and the question was whether the award was not void for uncertainty: it was held not to be so, on the ground that if an award direct one of two things to be done in the alternative, and one is void for uncertainty or is impossible, it is yet incumbent on the party to perform the other of them.(*m*)

§ **991**. (2) The leading authority on the second class of cases is Laughter's case,(*n*) where it was laid down, "that where a condition of a bond consists of two parts in the disjunctive, and both are possible at the time of the bond made, and afterwards one of them becomes impossible by the act of God, the obligor is not bound to perform the other part." On this case it may be remarked in the first place, that the case itself did not require the enunciation of the principle,(*o*) as both alternatives in the bond there put in suit were rendered impossible;(*p*) and in the second place, it is to be observed, that subsequent decisions show that the principle was stated too broadly, and that even at common law the intention of the parties has been gathered from the particular language of each instrument. In the case of Studholmes v. Mandell,(*q*) the court said that the rule and reason of Laughter's case ought not to be taken so largely as Coke has reported it, but according to the nature of the case; and Treby, C. J., quoted a case in which a bond was conditioned either to make a lease for the life of the obligee before such a day or to pay £100, and the obligee having died before the day, it was held in the common pleas that the obligor should pay the £100. And in Drummond v. Duke of Bolton,(*r*) in an action on a bond conditioned to pay or secure to the plaintiff or her children by William Ashe, her

(*l*) Da Costa v. Davis, 1 B. & P., 242.
(*m*) Simmonds v. Swaine, 1 Taunt., 549.
(*n*) 5 Rep., 21, b.; S. S., s. n. Eaton's case, Moore, 357; s. n. Eaton v. Laughter, Cro. Eliz., 398; accordingly Warner v. White, T. Jon., 95.
(*o*) Barkworth v. Young, 4 Drew. 1, 24.
(*p*) See the case in Cro. Eliz., 398.
(*q*) 1 Lord Raym, 279; Vnon, 1 Salk., 170.
(*r*) Say, 243. See, also, per Walmesley, J., in More v. Morecomb, Cro. Eliz., 864.

then intended husband, £3,000 within six months after the defendant should become Duke of Bolton, the defendant pleaded that William Ashe died without having any children before the defendant became Duke: but the plea was overruled, on the ground that the intention of the parties must be regarded, and that it could never have been their intention that the money should not be paid to the plaintiff in case she should not have a child by William Ashe at the time of the plaintiff becoming Duke, though if she then had a child, the defendant might have had his election to whom to pay the money.

§ **992**. And this view of the law was fully supported in a case before Kindersley, V. C., on a promise by A., on the marriage of his daughter with B., that he would at his death leave to his daughter an equal portion with his other children. The daughter died in the lifetime of her father, leaving children, and this circumstance was argued to be a discharge from the contract by an act of God. But the vice chancellor held the contract might have been performed in either of two ways,—namely, by A.'s making a provision for his daughter by will or by his dying intestate: and that though the death of the daughter precluded him from performing it in the first way, he was not thereby exonerated from performing it in the second, and that the bill, by which the husband prayed for an equal share in the testator's residuary estate, was not on that ground demurrable.(*s*) His honor, after referring to some of the previous cases, expressed his opinion that it is impossible to lay down any universal proposition either way, and that each case must depend upon the intention of the parties: but that where this intention is clear that one of the parties shall do a certain thing, but he is allowed his option to do it in one or other of two modes, and one of these modes becomes impossible by the act of God, he is bound to perform it in the other mode: and that, in the case before the court, it was manifestly the intention of the parties that, in one way or other, the daughter should have an equal share of the testator's property; and that if the father was prevented by the act of God from performing his obligation in one way, he

(*s*) Barkworth v. Young, 4 Drew., 1.

was bound to perform it in the other way, which was possible.(*t*)

§ **993**. In Jones v. Howe(*u*) a father on the marriage of his daughter covenanted by some act *inter vivos* or by will to leave his daughter a certain provision: no act *inter vivos* was done by the covenantor, nor did his will contain any provision for her: the daughter died in the lifetime of the father: the court of common pleas, on a case stated for its opinion by direction of Wigram, V. C., held that the covenantee had no cause of action, on the ground, it appears, of the provision by will having failed by the death of his daughter, and a consequent exemption from liability to perform the other alternative. The vice chancellor, though expressing an opinion that by this view the intention of the parties was disappointed, as the provision was intended to be absolute, and the mode of making it only intended to be left to the discretion of the covenantor, yet confirmed the certificate, and dismissed the bill with costs.

§ **994**. (3) Where one of the alternatives becomes impossible by the act or default of the party for whose benefit the contract is to be executed, the other alternative is discharged and need not be performed.(*v*) Therefore in debt on an obligation conditioned for the delivery up by the defendant to the plaintiff of three obligations in which the plaintiff is bound to the defendant, or for the execution to the plaintiff such release of them as should be devised by the plaintiff's counsil before Michaelmas, a plea that neither the plaintiff nor his counsel devised any release before Michaelmas was held good by a majority of the judges in the Queen's bench, on the ground that, where the obligee disables the obligor to perform the one part, the law discharges him from the other.(*w*) This authority was followed by another case in the same court, in which, in debt on a bond by the defendant conditioned to grant an annuity within six months after the death of A., and if he refused, on request then to pay £300, a plea that no grant had been tendered within six months was held good.(*x*)

(*t*) Page 25 The rule of the civil law seems to agree with this. "Si quis illud vel illud stipulatus sit, tot obligationes sunt quot corpora: quare, si altera res ex quacunque causa dari non potest, altera nihilominus debitur."—Warnkonig, Instit. Jur. Rom. Priv lib. iii. c. 2, t. 1, § 793.

(*u*) 7 Ha., 267; S. C. 9 C. B., 1.

(*v*) Com. Dig Condit. K, 2.

(*w*) Grenningham v. Ewer, Cro. Eliz., 396, 539

(*x*) Basket v. Basket, 1 Mod., 265; 2 Id., 200.

§ **995**. The principle of these cases is obvious. The contract gives the party to perform an election, and creates an obligation to perform only the elected thing, but the other party has destroyed the election and so has released the performing party from his obligation to do anything.

§ **996**. (4) Where one alternative is prevented by the act of a stranger rendering its performance impossible, the other alternative must be performed. This was held in a case in the 4th of Henry VII., which decided that if one be obliged to enfeoff me to certain lands, or to marry A. S. before such a day, and a stranger marry A. S. before the day, the obligor must make a feoffment of the lands: but otherwise if the obligee married A. S. before the day, for then the other alternative is discharged.(*y*)

§ **997**. (5) If, after the party to perform had elected to perform one alternative, that alternative becomes impossible, the effect of the impossibility is precisely the same as in the case of a single contract, for by election the contract has become single. The performing party therefore is ordinarily liable in damages.(*z*)[1]

(*y*) Quoted in Grenningham v. Ewer, Cro. Eliz., 397.

(*z*) Brown v. Royal Insurance Co., 1 El. & El., 853

[1] *Contract entire; no equitable middle ground; vendee must pay the whole purchase money.*] The contract for the sale of an estate was entire, for a sum in gross, and there was a failure of title to considerable portion, both parties being ignorant of the defect at the time of the sale. There was no equitable middle ground between an entire performance and an entire rescission. Held, that if the vendee declined to rescind, he must pay the entire purchase money. Glassell v Thomas, 3 Leigh, 113; Bailey v. James, 11 Gratt., 468; Gillman v. Hinckle, 8 W. Va., 262; Etheridge v. Vernoy, 70 N. C., 713.

Statement of the quantity of acres mere matter of description.] "The number or quantity of acres, after a certain description by metes and bounds, or by other known specifications, is but matter of description, and does not amount to any covenant though the quantity of acres should fall short of a given amount. Whenever it appears by the defining boundaries, or by words of qualification as 'more or less,' or as 'containing by estimation,' or the like, that the statement of the quantity of acres in the deed is mere matter of description, and not of the essence of the contract, the buyer takes the risk of the quantity, if there be no admixture of fraud in the case." 4 Kent's Com., 466.

Tract containing much less than agreed; map shown.] The vendee made a purchase under the belief, which he had good reason to entertain, that the farm sold contained a given number of acres, the representations as to the amount was made by the vendor, who exhibited a map of the property. Held, that where the farm contained very many less acres that equity would not compel the vendee to accept the property. Kent v. Carcand, 17 Md., 291; Winston v. Browning, 61 Ala., 80; Foley v. McKown, 4 Leigh, 678; Miller v. Chetwood, 1 Green's (N. J.) Ch., 199; see, also, Brooks v. Riding, 46 Ind., 15.

Example of no abatement in price, where tract contained much less than described.] A lot was sold, the contract providing that the vendee should pay a definite sum "for wharf lot on Border street;" the lot was further described

as bounded on two sides by ship-yards of named parties, and as "measuring about two hundred and twenty feet on Border street, more or less." The lot in fact measured only one hundred and seventy feet on Border street, and the value of the lot was shown to be in proportion to the number of feet on the line of that street Long before the contract the title deeds of the lot were matter of public record and showed the actual boundaries and extent of the lot. Neither the plaintiff's agent, or the defendant, had actual knowledge of those deeds. Held, Gray, J., delivering the opinion, which was unanimously concurred in, that no abatement of the price could be had. Noble v. Godking, 99 Mass., 231; see, also, Stebbins v. Eddy, 4 Mason, 414; Marvin v. Bennett, 8 Paige's Ch., 312; Morris Canal Co. v. Emmett, 9 id., 168; Fame v. Martin, 7 N. Y., 219: Ketchum v Stout, 20 Ohio, 453; Stull v. Hunt, 9 Gill., 446; Weart v. Rose, 16 N. J. Eq , 290; Stevens v. Hudson, 45 Ga., 513.

Where the words "more or less" are used.] In Stebbins v. Eddy, 4 Mason, 414, Story, J., said: "It seems to me that there is much good sense in holding that the words 'more or less,' or other equivalent words, used in contracts or conveyances of this sort, should be construed to qualify the representation of quantity in such a manner that, if made in good faith, neither party should be entitled to any relief on account of any deficiency or surplus. Nor am I prepared to admit that the fact that the sale is not in gross, but for a specific sum by the acre, ought necessarily to create a difference in the application of the principle. I do not say that cases may not occur of such extreme deficiency as to call for relief; but they must be such as would naturally raise the presumption of fraud, imposition or mistake in the very essence of the contract. Where the sale is fair and the parties are equally innocent, and the quantity is sold by estimation and not by measurement, then is little, if any, hardship, and much convenience, in holding to the rule *caveat emptor*." See, also, Pedens v. Owens, Rice.'s Eq , 55; Brown v. Parish, 2 Dana, 9; Hill v. Buckley, 17 Ves., 394; Smith v. Evans, 6 Bin., 102; Howes v. Barker, 3 Johns., 506; Twyfard v. Wareup, Finch, 310; Marvin v. Bennett, 8 Paige's Ch., 312.

CHAPTER XXIV.

OF THE RESCISSION OF THE CONTRACT.

§ **998**. The rescission of a contract necessarily constitutes a bar to its performance by either of the parties to it. The rescission may result from :

(1) A simple agreement between the parties to rescind the contract.

(2) An agreement between the parties to new terms which put an end to the terms of the old contract.

(3) An agreement between the original parties and a third person, by which the third person takes the place of one of the original contractors.

(4) An exercise of a power to rescind reserved by the contract to one or both of the contractors.

(5) An exercise of the right to rescind which results to the injured party from fraud or mistake in relation to the contract.

(6) An exercise of the right to rescind which results to one party from the other party's absolute refusal to perform the contract or unreasonable delay in its performance.

(7) An exercise of the right to rescind which results to one party from the other party's having made performance impossible.

1. *A simple agreement to rescind.*[1]

§ **999**. Generally speaking, the parties to a contract, supposing them both to continue *sui juris* and capable of con-

[1] When an agreement is thus rescinded by novation, the contract, or contracts, in existence prior to the novation, lose their individuality and become *merged* in the new contract. Pierce v. Dorr, 8 Pick., 239, is a case, at law, of this nature. The bill, in that case, charged that, on March 21, 1811, A. lent B. $3,000, receiving as security B 's deed of certain lands, but giving no instrument of defeasance; that B. repaid the sum lent, taking notes, whereby A. promised to pay the sums repaid, with interest, when the lands conveyed to him should be sold, if they produced the sums expressed as their consideration, with interest, and if not, the deficit was to be regarded as part payment of A.'s notes; that A. connected this with a former and separate transaction, by which A. had on March 7, 1811, received an absolute conveyance of certain other land as security for another debt; that the value of the land exceeded the amount of B.'s debt, and that it was understood that A. should sell the land, and after deducting the

tracting, have a right to determine it by an agreement to rescind it, or to use other words, a waiver and abandonment by mutual consent of the parties: and this they may do even when the contract between them affects the interests of some third person; except, it seems, where there has been a part performance of it affecting the third person. So that where A. by deed contracted with B. that A.'s son should reside with and be brought up by B., who covenanted to leave him certain property, and there was no appreciable part performance as regards the child, so that his condition in life had not been altered, and no exception on his part was defeated, it was held that A. and B. might by agreement rescind the deed, though it would, it seems, have been different if there had been any part performance affecting the child.(*a*)

§ **1000**. An agreement to rescind a contract which is in writing(*b*) or under seal(*c*) may clearly in equity be by parol.

(*a*) Hill v. Gomme, 1 Beav., 540; S. C. 5 My. & Cr., 250; supra, § 182.
(*b*) Davis v. Symonds, 1 Cox, 402, 406.
(*c*) Hill v. Gomme, 1 Beav., 540; Lady Lanesborough v. Ockshott, 1 Bro. P. C., 151. See, for the doctrine at Common Law, Goss v. Lord Nugent, 5 B & A. D. 58; Harvey v. Grabham, 5 A & E., 61

amount of said debt, pay the surplus to B It was also charged that in May, 1813, A. and B. signed an agreement stating that A. had bought the above named lands of B., and that B. desired to repurchase them, and binding A. on the payment of $3,296.46 in two years, with interest, to quit-claim said land to B., and also binding A. to convey said lands, whenever before two years a fair price could be obtained, and to apply the proceeds to the payment of the aforesaid sum, and the surplus, if any, to be paid to B. A.'s notes were then given up to him. Held, that this agreement was a merger of all the previous ones, and that a bill to enforce a trust arising therefrom could not be maintained. See, also, Reed v. McGrew, 5 Ham., 380. Agreements may, of course, at all times be entered into by parties for the rescission of prior executory contracts, provided that they continue interested in the original agreement until the agreement to rescind is made. Johnson v. Reed, 9 Mass., 78; Blood v. Enos, 12 Verm., 625; England v. Jackson, 3 Humph., 584. But an offer to rescind an agreement will not be binding before it is accepted by the other party, by doing what is proper to be done by him toward the rescission, although the agreement has been delivered up for cancellation. Fripp v. Fripp, Rice's Ch., 84. When the administrators of parties to an unexecuted contract for the sale of lands make an arrangement to rescind it, advantageous to the purchaser, a court of equity will not permit an heir to set it up again. Howard v. Babcock, 7 Ham. (2d pt.), 73. There are agreements, however, which subsequent contracts will not, in all cases, annul. Thus, for example, where there is an agreement, upon an adequate consideration, to pay a certain sum, it cannot be avoided by an agreement to receive a less sum. Geisner v. Kershner, 4 Gill & Johns., 305; Seymour v. Minturn, 17 id., 169; also, Inman v. Griswold, 1 Cow., 199; Makepeace v. Harvard College, 10 Pick., 298. Yet, if a creditor agree with an insolvent and embarrassed debtor, that he will procure security for a part of the debt, he will release the residue, and the debtor performs the agreement, it constitutes a valid contract; and if the creditor afterwards enforce payment of the whole, the debtor may recover damages for a violation of the contract. Colborn v. Gould, 1 N. H., 279.

§ **1001**. Against this conclusion various arguments have at various times been raised: it has been urged that the rule of law does not allow the variation of a contract that has been reduced to writing to be evidenced by parol; but to this it has been replied that rescission is not variation, that the law allows parol evidence of matters collateral to a contract,(*d*) and that rescission or waiver being in its nature subsequent and collateral to the contract may therefore be proved by parol testimony.(*e*)

§ **1002**. Again, it has been urged that the statute of fraud precludes parol evidence of rescission of contracts relating to land: for a contract to waive a purchase of land as much relates to land as the original contract.(*e*) But it is replied that the rescinding contract is not the contract on which the action is brought, and that whilst the statute provides that no action shall be brought on any contract of the descriptions there specified, except it be in writing, it does not provide that every such written contract shall support an action. In the result it is perfectly well ascertained that a contract in writing, and by law required to be in writing, may in equity be rescinded by parol;(*f*) and waiver by mutual parol agreement therefore furnishes a sufficient defense to an action for specific performance.(*g*)

§ **1003**. Any circumstances or course of conduct from whence can be clearly deducted an agreement to put an end to the original contract will amount to a rescission of it. Thus, to give one or two examples: where, on default in payment of the purchase-money, one party said to the other that there must be an end of the negotiation, and the other assented, the contract was held to have been rescinded.(*h*) And where the vendor was allowed for a long period to remain in possession, and the purchaser's representatives seventeen years afterwards treated themselves, in a deed between the parties, as entitled to interest on the debt which had been the consideration for the sale and not to the

(*d*) Pym v. Campbell, 6 El. & Bl., 370.

(*e*) Davis v Symonds, 1 Cox, 402, 406. This seems denied, as to waiver at Common Law, by Lord Hardwicke in Bell v. Howard, 9 Mod., 305.

(*e*) Per Lord Hardwicke in Buckhouse v. Crosby, 2 Eq. Cas. Abr., 33.

(*f*) Goman v. Salisbury, 1 Vern., 240; Inge v. Lippingwell, 2 Dick., 469; S. C. 5 Vin. Abr. 516, pl. 22; per Grant, M. R. in ex parte Lord Ilchester, 7 Ves., 377. See also Buckhouse v. Mohun, 3 Sw., 434 n.; Buckhouse v. Crosby, 2 Eq. Cas. Abr., 32, pl., 44.

(*g*) Davis v. Symonds, 1 Cox, 402; Bobinson v. Page, 3 Russ., 114.

(*h*) Carter v. Dean of Ely, 7 Sim., 211.

rents and profits of the land, the contract was held to have been waived.(*i*)

§ **1004**. But the court must be satisfied of this total abandonment by both parties to the contract. "The court," said Lord St. Leonards, "requires as clear evidence of the waiver as of the existence of the contract itself, and will not act upon less."(*j*) And in another case his Lordship said that, unless a party has by his conduct forfeited his right, "abandonment of a contract, according to the law of this court, is a contract in itself;" and accordingly he refused to hold a loose conversation which was alleged as a waiver of a contract for a lease to amount to such a new contract.(*k*)

§ **1005**. To these cases may be likened those where an absolute refusal of one party gives rise to a right to rescind in the other: the refusal must be clear, total, and unqualified.(*l*)

§ **1006**. An agreement to rescind an existing contract must amount to a total abandonment of the whole contract, and not to a partial waiver of some of its terms: for to allow of such a proceeding in the case of a written contract would be to have a contract proved partly by writing, and partly by parol:(*m*) it would be a parol novation of a written contract, which is inadmissible where the law requires the contract to be evidenced by writing:(*n*) and therefore the agreement, or the circumstances from which it is inferred, must show an absolute dissolution and abandonment of the contract.(*o*)[1]

(*i*) Earl of Ross v. Sterling, 4 Dow, 442. See also Hill v. Gomme, 1 Beav., 540.

(*j*) Carolan v. Brabazon, 3 Jon. & L., 200, 209; Whittaker v. Fox, 14 W. R., 192; Harrison v. Brown, 14 W. R., 193 n.; Clifford v. Kelly, 7 Ir. Ch. R., 333; Cartan v. Bury, 10 Ir. Ch. R., 400.

(*k*) Moore v. Crofton, 3 Jon. & L., 438, 445; Whittaker v. Fox, 14 W. R., 192.

(*l*) Ehrensperger v. Anderson, 3 Ex., 148; Avery v. Bowden, 5 El. & Bl., 714; 6 id., 953; infra, § 1035.

(*m*) Goss v. Lord Nugent, 5 B. & Ad., 58.

(*n*) Infra, § 1016.

(*o*) Price v. Dyer, 17 Ves., 356; Robinson v. Page, 3 Russ., 114. Lord Thurlow seems to have thought that a part might be rescinded by parol, in Jordan v. Sawkins, 1 Ves. Jun. 404.

[1] Where a contract is rescinded it must be entirely rescinded. Glassel v. Thomas, 3 Leigh, 113. So, where A. sold to B. a plantation of slaves, a part of whom had been introduced in the State (Mississippi) contrary to the constitution, and B. paid a large portion of the purchase money, knowing of the illegal introduction of the slaves, it was held, that the court could not order the money to be paid back and rescind the whole contract, and, therefore, must refuse its aid, the contract being entire, and it being contrary to the doctrines of equity to rescind a contract only in part. Hope v. Evans, 1 S. & M.'s Ch., 195. The same principle is carried out at law. Potter v. Titcomb, 9 Shep., 300. And, therefore, where a party to an agreement for the purchase of land sought

§ **1007**. The cases, of which many have arisen at common law (and which will be considered subsequently[*p*]), of the rescission of a contract by the one party based on an absolute refusal to perform by the other, may well be brought under the head of agreement to rescind.

§ **1008**. It is to be borne in mind that the conduct of one party, which may debar him from insisting on a contract, may yet not prevent its being enforced against him or amount to a rescission of it:(*q*) and further, that there are many cases in which there has been such a departure in conduct from the contract between the parties, that the court will refuse to execute the contract, though the effect of that conduct may not have been to substitute a valid contract for the old one, or absolutely to rescind the old one for all purposes.(*r*)

2. *An agreement upon new terms.*

§ **1009**. Where the parties to a contract come to a fresh agreement of such a kind that the two cannot stand together, the effect of the second agreement is to rescind the first. This is one form of *novatio* in the Roman law.(*s*)

§ **1010**. But it is not every change in a term of the original contract which will amount to such a substitution as to extinguish that contract. Thus where there was a contract for a lease, and a parol agreement was subsequently made for the reduction of the rent, which, it was contended, worked a rescission of the original contract, Lord St. Leonards said, "I should be sorry to hold that because a landlord abates the rent for a time or permanently, he therefore abandons the whole contract. * * * I should do a most mischievous thing were I to hold that a mere abatement of rent, which occurs every day, would altogether put an end to the existing contract, and create a new tenancy

(*p*) See infra, § 1035.

(*q*) Price v. Assheton, 1 Y. & C. Ex., 82.

(*r*) An example of this seems afforded by the case of the Paris Chocolate Co. v. Crystal Palace Co., 3 Sm. & Gif., 119.

(*s*) "Novatio est prioris debiti in aliam obligationem aut civilesm aut naturalem et translatio: hoc est cum ex præcedenti causa ita nova constituatur, ut prior perimatur." Dig. lib. xlvi. t. 2, c. 1. See, also, Instit. lib. iii. tit. 30, s. 3.

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to affirm the agreement in part, and rescind it in part, and maintain assumpsit for the price paid for the part which he claimed to rescind, the court prevented him from so doing. Rinker v. Sharp, 5 Blackf., 185. Upon these grounds, an agreement which is rescinded in part will be treated as rescinded *in toto*. Raymond v. Bearnard, 12 Johns., 274.

from year to year. The abatement of the rent was rather a confirmation of the existing tenancy, with a relaxation of one of the terms of it.(*t*)

§ **1011**. So, also, a suggestion made by either party after contract for the purpose of obviating any difficulties in the completion of it, will not be taken to amount to a novation, so to hold would be to preclude parties from endeavoring to remove objections by concessions of any kind.(*u*).

§ **1012**. But where the defendant being in possession of a house under a contract for a lease, the plaintiff and the defendant entered into a further contract to the effect that the plaintiff would accept H. W. as his tenant in lieu of the defendant, and on the same terms, the defendant undertaking to guarantee the rent during H. W.'s tenancy, and H. W. accordingly for several years occupied the property and paid rent, it was held that the latter contract must be considered a substitution for the former.(*v*)

§ **1013**. As it is the existence of the new contract that works the extinction of the old, this new one must, of course, be a valid contract: so that, for instance, where a second contract is alleged, but without consideration, the original contract will remain intact, and may be executed without regard to the second.(*w*)[1]

§ **1014**. This makes it requisite to consider the evidence of the new contract alleged.

(1) Where the original contract is by parol, the new one may, of course, be by parol also.[2]

(*t*) Clarke v. Moore, 1 Jon. & L., 723, particularly 728-9.
(*u*) Monro v. Taylor, 8 Ha., 51, particularly 61.
(*v*) Moore v. Marrable, Lr. 1 Ch., 217.
(*w*) Robson v. Collins, 7 Ves. 130.

[1] In Thurston v. Percival, 1 Pick., 415, services were performed by one person for another, and afterwards the parties entered into a contract as to the compensation, which was illegal. It was held that this agreement did not operate as a merger of the original demand.

[2] *Possession under parol gift.*] Naked possession under an alleged parol gift of land will not constitute such part performance as will take the case out of the operation of the statute of frauds Stewart v. Stewart, 3 Watts, 253; Cronk v. Trumble, 66 Ill., 428; Pinckard v. Pinckard, 23 Ala., 649.

Rule as to the degree of occupation.] In order that a court of equity will decree specific performance of a parol agreement the possession of the vendee must be such that if the vendor refuses to complete it will be a fraud upon him. White v. Watkins, 23 Mo., 423; Chambers v. Lecompte, 9 id., 566. Possession must be taken with the permission of the vendor and must refer to and be connected with the contract; in such a case it shows a part performance by the vendor. Lord v. Underdunk, 1 Sandf.'s Ch., 46; Beau v. Valle, 2 Mo., 103; Jarvis v.

§ **1015.** (2) Where the original contract was in writing, though not by law required so to be, the new contract may be evidenced in any way which establishes it according to the principles of the court. Thus a contract, though under seal, may in the contemplation of the court of equity be waived by a course of conduct from whence the presumption of a new contract in substitution arises. "In ordinary partnerships," said Lord Eldon, "nothing is more clear than this, that although partners enter into a written agreement, stating the term upon which the joint concern is to be carried on, yet if there be a long course of dealing, or a course of dealing not long, but still so long as to demonstrate that they have all agreed to change the terms of the original written agreement, they may be held to have changed those terms by conduct."(*x*) And accordingly, in another case, where a contract for a partnership was decreed to be specifically executed, the court directed an inquiry whether any and what variations had been made in the

(*x*) Const v. Harris, T. & R., 496, 523; Geddes v. Wallace, 2 Bli., 270, 297; Jackson v. Sedgwick, 1 Sw , 460, per Lord Langdale M. R. in Smith v. Jeyes, 4 Beav., 505.

Smith, 1 Hoff.'s Ch., 470; Givens v. Calder, 2 Dessau.'s Eq., 171, 190; Wills v Stradling, 3 Ves., 381; Gregory v. Mighell, 18 id., 333; Thompson v. Scott, 1 McCord's Ch., 39; Cole v. White, 1 Bro., 409; Morphett v. Jones, 1 Swanst., 179; Foot v. Mitchell, 1 B. & B., 400; Harris v. Knickerbocker, 5 Wend., 638; Aitkin v. Young, 12 Pa. St., 15; Cristy v. Barnhart, 14 id., 260; Carroll v. Cox, 15 Iowa, 455; Moore v. Higly, 45 Ind., 487. Lord Manners, in Kine v. Balfe, 2 Ball & Beatty, 343, said: "Whether possession be an unequivocal act amounting to part performance must depend upon the transaction itself. If it be distinctly referred to, the contract alleged in the pleadings, I think no case has denied that it is a part performance. The defendant is protected from liability as a trespasser, and the plaintiff is disabled from dealing with any other person." There was a parol agreement for the sale of a mining claim, under which the vendee took possession, paying a part of the agreed price with the proceeds of the mine, all of which he appropriated to his own use. Held, sufficient to take the contract out of the operation of the statute of frauds. Taterm v. Brooker, 51 Mo., 148.

Length of time of possession important.] Long continued possession, with the acquiescence of the vendor, will be regarded as a strong circumstance against permitting the statute to be pleaded. Blatchford v. Kirkpatrick, 6 Beav., 232; Bonier v. Caldwell, 8 Mich., 463; Rhea v. Jordan, 28 Gratt., 678; Lester v. Lester, id., 737; Miranville v. Silverthorn, 1 Grant (Pa.), 410; Palmer v. Richardson, 3 Strobh.'s Eq., 16.

Possession must be under the parol contract sought to be enforced and none other.] In order that a parol contract may be taken out of the operation of the statute of frauds, where possession has been given, the possession must have been surrendered under the very contract and none other. A tenant in possession, purchasing, would not come within the rule, he would have entered under another agreement. Danforth v. Laney, 28 Ala., 274; Tate v. Jones, 16 Fla., 216; Charpiot v. Lingerson, 25 Mo., 63; Cole v. Potts, 10 N. J. Eq., 67; Litton v. Shipp, 65 Mo., 293; Knoll v. Harvey, 19 Wis., 99; Davis v. Moore, 9 Rich., 215; Mohana v. Blunt, 20 Ia., 142; Rosenthall v. Freeburgher, 26 Md., 75.

original contract by the consent of the partners, and directed the deed to be settled by the master having regard to such variations.(*y*)

§ **1016**. (3) Where the original contract is by law required to be in writing, the new one must be in writing also, if the plaintiff insists on it as part of his case; so that, for instance, where the relation of landlord and tenant is constituted by writing, a contract for an abatement of rent set up by the plaintiff must be in writing also.(*z*)[1] From the principles of the court, however, in regard to part performance, an exception naturally arises, as the new contract may in this, as in any other case, be by parol, if supported by acts of part performance.[2] Thus, for example, where W. leased to N. a house for eleven years, and was to allow £20 for repairs, and this contract was signed and sealed by the parties, and N., finding that the repairs of the house would cost more than £20, laid out a further sum, in consequence of W.'s having promised to enlarge the term, but without mentioning for what term: Jekyll, M. R., carried the parol contract into effect, on the ground that it was a new contract, and that the laying out of money was a part performance on the one part, which made it needful to execute the parol contract on the other.(*a*)

§ **1017**. But where the new contract is relied on only as an extinguishment of the old one, the mere fact that it is not in writing, and so could not be put in suit, seems to be no ground for denying its effect in rescinding the original contract. The statute of frauds does not make the parol contract void, but merely prevents an action upon it; and it does not seem to be necessary to the extinction of one contract by another that the second contract could be actively enforced. The point has never, it is believed, been

(*y*) England v. Curling, 8 Beav., 129.
(*z*) O'Connor v. Spaight, 1 Sch. & Lef., 305.
(*a*) 5 Vin. Abr., 522, pl. 38.

[1] So where the subject matter of an agreement was the sale of land, a parol promise made by the vendee, that he would take no advantage of a delay of performance beyond the time fixed, was not deemed a waiver of the party's right to recover a stipulated sum as liquidated damages for not performing on the day, such promise being void by the statute of frauds, and, therefore, incapable of affecting the previous contract. Hasbrouck v. Tappen, 15 Johns., 200.

[2] This doctrine is equally well established in this country. Walker v. Whaley, 2 Humph., 119; England v. Jackson, 3 id., 584; McCorkle v. Brown, 9 Sm. & Marsh., 167.

matter of decision.(*b*) But in point of principle it seems to stand on the same footing as a good simple agreement to rescind.

3. *An agreement with a third person.*

§ **1018**. An agreement between the original parties and a third person, by which the third person takes the place of one of the original contractors, creates a new contract on the old terms between the new parties and rescinds the original contract.

§ **1019**. So where M. agreed with a company to take certain shares, and no payment was made by M., so that according to the contention of the liquidator of the company he had no right to the shares: and M. then transferred the shares to G., and G. was registered: it was held that, assuming the contention to be correct, the contract with M. was restricting *in fieri*, and the transfer to which the company was a party constituted a new contract to take the same shares between the company and G., and that the old contract with M. was discharged by the new contract with G.(*c*)

§ **1020**. So again where A. sold shares to B., and B. sold them to C., and A. executed a deed of transfer to C., which C. refused to register; A. brought a bill for specific performance against B., but it was held that A., having assigned the shares to C., had determined the privity of contract with B., and that he could not make a title to the shares. The main question in the case was whether C. was merely the nominee of B., or there was a substantive contract between A. and C.: the latter was the view taken under the circumstances.(*d*)

§ **1021**. In the chapter on contracts for the sale of shares,(*e*) it will be seen that questions of novation by the introduction of a third person arises upon sales on the stock exchange. The reader is referred to that chapter for their bearing on the question of novation.

§ **1022**. There are two other classes of contracts in respect of which the question of novation has frequently

(*b*) See Vinnius, Commen. in Inst. lib. iii. tit. 30. As to a parol contract at common law to vary (in effect) the terms of a deed, see Nash v. Armstrong, 10 C. B. N. S., 259.

(*c*) Morton's case, L. R. 16 Eq., 104. Cf. Ex parte Beresford, 3 Mac. & G., 197; Moore v. Marrable, L. R. 1 Ch., 217.

(*d*) Shaw v. Fisher, 5 De G. M. & G., 596; Holden v. Hayn, 1 Mer., 47; Hall v. Laver, 3 Y. & C. Ex., 191; Stanley v. Chester and Birkenhead Railway Co., 9 Sim., 264; S. C. 3 My. & Cr, 773; supra, § 151.

(*e*) Infra, Part VI., chap. 1, § 1472, et seq.

arisen—the first relating to continued dealings between A. and one set of partners and A. and another set of partners successors in trade to the former; and the second relating to the dealings of a person insured in one company and continuing to make payments to another with which the first had amalgamated, or to which it had assigned its business. The full discussion of these classes of cases would be too remote from the subject of these pages to be here proper.

4. *Exercise of a power to rescind reserved by the contract.*

§ **1023**. Generally speaking, one party to a contract cannot rescind it, except by consent of the other party, but this general principle is liable to exceptions. The first that falls to be noticed is where the contract reserves to one or both of the contracting parties a power in certain specified circumstances to rescind the contract.(*f*) Such stipulations are frequent in contracts for the sale of land. It will be desirable briefly to consider these stipulations.

§ **1024**. When a contract stipulates that on the happening of a certain event it shall be void, the construction put upon it by the courts generally is, that it may on this event be rescinded by the party injured by such event. Thus a proviso that in case the vendor of an estate cannot deduce a good title, or the purchaser shall not pay the money at the appointed day, the contract shall be void, has been held to mean that in the former case the purchaser, and in the latter the vendor, may avoid the contract, and not that the contract is utterly void.(*g*)

§ **1025**. A right to rescind a contract on the non-performance of an act, which act it is the duty of the party invested with the right of rescission to perform if he can, will not give such party a right to refuse to perform his part of the contract, but will be held to apply where the act cannot be done: thus where there is a condition that, if any objection shall not be removed within a limited time, the vendor shall be at liberty to annul the contract, the vendor is not entitled to neglect to remove any objection, and then, on the strength

(*f*) E. g. Marsden v. Sambell, 28 W. R, 952. also, Doe d. Nash v. Birch, 1 M. & W., 402;
(*g*) Roberts v. Wyatt, 2 Taunt., 268. See, Hyde v. Watts, 12 M. & W., 254.

of his own neglect, to annul the contract,(*h*) but the condition will entitle him to rescind the contract if, having done all that is incumbent on him, he fails to show a good title.(*i*) But where the right to rescind is limited to arise in case of his being unable or unwilling to do the act, the case is of course different, and he is generally exempted at his election from any obligation to do the act.(*j*)

§ **1026**. Instances of the exercise of this right to rescind may be found in the following cases.(*k*) The contract stipulated that if from any cause whatever the purchase was not completed by the time specified, the vendor was to be at liberty to annul the contract. At the day appointed the parties met, and the vendor offered and the purchaser accepted the vendor's undertaking to satisfy certain unsatisfied requisitions. Nevertheless the purchaser refused to pay the purchase-money, whereupon the vendor said that he would annul the contract if the money was not paid: the purchaser refused to pay till the requisitions were satisfied: the vendor on the same day annulled the contract by notice, and successfully maintained a bill for an injunction to restrain any proceedings at law on the contract.(*l*)

§ **1027**. In another case, one condition provided that if any objection to title were persisted in, the vendor might rescind the contract: another provided that if any mistake should appear in the description of the property or of the vendor's interest therein, compensation should be given. A question arose as to the rights of the lord of the manor to certain mines or minerals, the purchaser claimed compensation and the vendor rescinded: the purchaser brought his bill for performance with compensation: the vendor relied on his rescission. The court held that the question in dispute was one of title, and that the vendor was therefore entitled to rescind.(*m*)

§ **1028**. A condition enabling the vendor to annul the sale if the purchaser should make any objection or requisition which the vendor should be unwilling on the ground of expense or otherwise to comply with, does not enable a

(*h*) Greaves v. Wilson, 25 Beav., 290; cf. Re Jackson & Oakshott, 14 Ch. D., 851.

(*i*) Page v. Adams, 4 Beav., 269.

(*j*) Tanner v. Smith, 10 Sim., 410; Morley v. Cook, 2 Ha., 106; Duddell v. Simpson, L. R. 2 Ch., 102, varying S. C. L. R. 1 Eq., 578; Gray v. Fowler, L. R. 8 Ex , 249. See however Powell v. Powell, L. R. 19 Eq. 422; Re Jackson & Oakshott. 14 Ch. D., 851.

(*k*) See too infra, §§ 1164. 1165.

(*l*) Hudson v. Temple. 29 Beav., 536. Distinguish Turpin v. Chambers, ib., 104.

(*m*) Mawson v. Fletcher, L. R. 10 Eq., 212; 6 Ch , 91.

vendor who shows no title whatever to rescind. Such a vendor was consequently made to pay damages for his non-performance.(*n*)

§ **1029**. Where a right to rescind a contract must be exercised within a reasonable time after it arises, or at any time before it is waived or abandoned, may be open to question.(*o*)[1] But it is conceived to be clear that a party who, having a right to rescind, either himself does some act under the contract which involves or implies the continued existence of the contract, or suffers the other party to do such act without asserting the right to rescind, has thereby lost that right.

§ **1030**. Thus where conditions of sale stipulated that if there was any objection which the vendor should be unable or unwilling to remove he might rescind the contract, and the purchaser should be entitled to his deposit without interest or costs, it has been held that such a condition is confined to the objections first taken after the abstract is delivered, and that a treaty between the parties for the completion of the purchase is a waiver of the condition,(*p*) it being, of course, evidence of the vendor's willingness to remove the objection.[2] Such a condition will apply, if it be acted on by the vendor the moment the defect is known to him, but will not allow him to spend time in fruitless efforts to remove the objection, and then to rescind the contract on the terms of the condition.(*q*) And so where money is payable by instalment, and there is a power to rescind on breach of the contract, the receipt of money due on a subsequent instalment is a waiver of the right to rescind for

(*n*) Bowman v. Hyland, 8 Ch. D., 588, and see Re Jackson & Oakshott, 14 Ch. D., 851, cited infra, Part V., chap. 1, § 1165.

(*o*) See Morrison v. Universal Marine Insurance Co., L. R. 8 Ev., 40, 197, particularly 205; and see Marsden v. Sambell, 28 W. R., 952; Ker v. Crowe, L. R. 7 C. L., 181; and supra, § 709.

(*p*) Tanner v. Smith, 10 Sim., 410; Morley v. Cook, 2 Ha., 106. See, also, Cutts v. Thodey, 13 Sim., 206.

(*q*) McCulloch v. Gregory, 1 K. & J., 286; Lane v. Debenham, 17 Jur., 1005.

[1] The same doctrine obtains at law. Canfield v. Wescott, 5 Cow., 270; Mancius v. Sergeant, id., 271; Church v. Ayres, id., 272. But when a contract shall be thus rescinded, if there be a mode of rescission provided, it must be rescinded in that way. McKay v. Carrington, 1 McLean, 50.

[2] And an application for a rescission must likewise be made as soon as the cause of rescission is discovered. Ayres v. Mitchell, 3 S. & M., 683. In all cases there must be promptness on the part of the one seeking the rescission; he must move in the matter on the first knowledge of the breach; and if, after knowledge of the violation of the contract, he negotiates with the other party, he waives all right of rescission. Lawrence v. Dale, 3 John.'s Ch., 23; McKay v. Carrington, 1 McLean, 50.

default in respect of a previous one.(*r*) So the receipt of royalty at a reduced rate is a bar to the exercise of a right of rescission reserved on the non-payment of royalty at a higher rate.(*s*)

§ **1031.** Where the contract stipulates for a right of rescission in respect of separate breaches, the waiver of one will not waive another: so that where there was a contract for the payment of money by instalments, and that time should be of the essence, and further, a power to rescind on breach of the contract, it was held that each default of payment of an instalment at the stipulated time was a fresh breach of the contract, on which the right to rescind arose.(*t*)

§ **1032.** Where there are conditions for compensation and for rescission(*u*) the courts will, for obvious reasons, generally construe them so as to confine the right to rescind to cases not within the condition for compensation. Thus, in a case in which particulars of sale by error, but without fraud or gross negligence on the part of the vendor, described part of the property as a customary leasehold holden of a manor renewable every twenty-one years on payment of a customary fine, and the property was in fact holden only for a term of twenty-one years with no customary right of renewal; the fourth condition of sale, after providing for the delivery of the abstract and of objections to the title, stipulated that the vendor should be at liberty at any time after the delivery of such objections to vacate the sale, and that the deposit was thereupon returned without interest, costs, or other compensation; the fifth condition of sale provided that the purchaser should accept the existing lease and the assignment to the vendor as a sufficient title to this property; and the sixth condition stipulated that if through any mistake the estate should be improperly described or any error or mis-statement be inserted in the particular, the same should not vitiate the sale, but that compensation should be made by either party, as the case might be. The purchaser filed a bill for specific performance with compensation, contending that the error was within the sixth condition: the vendor resisted performance and sought to vacate the contract, on the ground that it was within the

(*r*) Hunter v. Daniel, 4 Ha., 420.
(*s*) Warwick v. Hooper, 3 Mac. & G., 60. See, also, Langridge v. Payne, 2 J. & H., 423.
(*t*) Hunter v. Daniel, 4 Ha., 420.
(*u*) Cf. infra, §§ 1258, 1259.

fourth condition. Lord Hatherly (then V. C.), referring to the fifth condition as explaining the use of the word title in the condition, held that this was rather a mis-statement of the subject-matter of the sale than of the vendor's title to it, and therefore within the sixth and not within the fourth condition of sale; and he accordingly enforced specific performance with compensation:(*v*) and Lord Romilly, M. R., put a like construction on similar conditions in a similar case.(*w*)

§ **1033**. It remains to remark that the plaintiff, bringing an action for the specific performance of a contract, may claim in the alternative that, if the contract cannot be enforced, it may be rescinded and delivered up to be cancelled,(*x*) provided that the alternative relief is based on the same state of facts, though with different conclusion as to law.(*y*) When the action is brought by the vendor, and the purchaser has been in possession, this alternative claim may embrace an account of the rents and profits.(*z*) But, for the reason already stated, an action to set aside a transaction for fraud or, in the alternative, for specific performance of a compromise cannot be sustained.(*a*)

5. *Rescission on the ground of fraud or mistake.*

§ **1034**. Either party to a contract who has been led into it by fraud may rescind the contract:(*b*) and either party to a contract who by fraud of the other party has been prevented from obtaining the full benefit of it may rescind the contract.(*c*) This right is discussed in the chapter on fraud.(*d*)

Mistake is also under some circumstances a ground for rescission.(*e*)

6. *Where one party has refused to perform or unreasonably delayed performance.*

§ **1035**. Where one party to a contract absolutely refuses

(*v*) Painter v. Newby, 11 Ha., 26; Nelthorpe v. Holgate, 1 Coll., 203. See, also, Mawson v. Fletcher, L. R. 10 Eq., 212; 6 Ch., 91.

(*w*) Hoy v. Smithies, 22 Beav., 510.

(*x*) Moseley v. Virgin, 3 Ves., 184; Costigan v. Hastler, 2 Sch. & Lef., 160, 166; Stapylton v. Scott, 13 Ves., 425; Clarke v. Fauxe, 3 Russ., 320; King v. King, 1 My. & K., 442; Douglass v. London and North-Western Railway Co., 3 K. & J., 173; Forster v. Great Eastern Railway Co., W. N. 1868, 122.

(*y*) Rawlings v. Lambert, 1 J. & H., 458, and see Ord. XIX. r. 8.

(*z*) Williams v. Shaw, 3 Russ., 78 n.

(*a*) Cawley v. Poole, 1 H. & M., 50. Distinguish Bagot v. Easton, 7 Ch. D., 1.

(*b*) Onions v. Cohen, 2 H. & M., 354, 361.

(*c*) Panama &c. Telegraph Co. v. India-rubber, etc, Co., L. R. 10 Ch., 515.

(*d*) Supra, Part III., chap. xiv., § 673 et seq.; and cf. Cargill v Bower, 10 Ch. D., 502, and per Lord Blackburn in Brownlie v. Campbell, 5 App. C., 949

(*e*) See supra, § 750; and cf. Cullen v. O'Meara, I. R. 1 C. L., 640, 4 C. L., 537 (misdescription).

to perform his part of the contract, either before or after the hour for performance has arrived,(*f*) the other party may accept that refusal and thereupon rescind the contract. So that where a man contracted to buy straw to be delivered by instalments, and to pay on delivery, and after a time refused to pay for the last load delivered and insisted on always keeping one payment in arrear, the other party was held entitled to rescind the contract.(*g*) But to justify rescission for this reason, the refusal to perform must not be mere non-performance or neglect in performance: "there must have been something equivalent to saying 'I rescind the contract,'—a total refusal to perform it, or something equivalent to that which would enable the plaintiff on his side to say, 'If you rescind the contract on your part, I will rescind it on mine.'"(*h*) In an earlier case in the Queen's Bench, these cases were explained by Coleridge, J.,(*i*) as depending upon the concurrence of the parties in the rescission, so that they may really be considered as cases in which an agreement to rescind is proved by the acts of the parties.(*j*)

§ **1036**. Where, on becoming insolvent, a contracting party practically gives notice to his creditors and those who have contracted with him that he does not mean to pay any of his debts or perform any of his contracts, there is a refusal which may be accepted by the other side, and that by conduct as well as by express rescission.(*k*)

§ **1037**. The right to rescind which arises from unreasonable delay in performance will be considered in the next chapter.(*l*)

7. *Where one party has made performance impossible.*

§ **1038**. It is a clear principle of law that if by any act of one of the parties the performance of a contract be rendered impossible, the other party may, at his election, rescind the contract,(*m*) so that where A. contracted with B. to supply B. with a chariot for five years, which A. was to repair, and

(*f*) Danube and Black Sea Railway, etc., Co. v. Xenos, 11 C. B. N. S., 152; 13 C. B. N. S., 825.
(*g*) Withers v. Reynolds, 2 B. & Ad., 882
(*h*) Ehrensperger v. Anderson, 3 Ex., 148, per Parke B., 158; Freeth v. Burr, L. R. 9 C. P., 208
(*i*) Franklin v. Miller, 4 A. & E., 599.
(*j*) See further 2 Smith, L. C. 35 et seq. (8th ed.)
(*k*) Ex parte Chalmers, L. R. 8 Ch., 289; Morgan v. Bain, L. R. 10 C. P., 15; cf. Scrimgeour's claim, L. R., 8 Ch., 921.
(*l*) See too Micholls v. Corbett, 34 Beav., 376.
(*m*) Panama, etc., Telegraph Co. v. India-rubber, etc., Co., L. R. 10 Ch. 515, 532.

before the five years had expired A. made over the chariot to his successor in trade and thereby disabled himself from performing the unperformed part of the contract, B. was held at liberty to rescind it.(*n*) Similarly it seems queer that a contract to convey an estate may be rescinded if the vendor convey the estate to a third person :(*o*) that a contract to pay in goods may be rescinded if the payer part with the goods :(*p*) that a contract to write an essay for a particular series may be rescinded if the publisher finally abandon the series :(*q*) that a contract to accept and pay for a telegraph cable on the certificate of an engineer may be rescinded if the party to deliver the cable bribe the engineer.(*r*)

§ **1039**. The impossibility must, it seems, arise in respect of some substantial or essential part of the contract ;(*s*) though it is not perhaps clear on principle why a contracting party who disables himself from performing *modo et formâ* should be at liberty to allege that the incapacity which he has produced is in a non-essential particular.

§ **1040**. But even though the particular in respect of which the impossibility arises may not be of the essence of the contract, yet if it be brought about by the fraudulent misconduct of the defendant, the plaintiff's right to rescind is clear in equity. Thus where Company A. contracted with Company B. to lay a telegraph cable for Company B., and then bribed the engineer for whose services in certifying as to the work the contract provided, Mellish, L. J., held that even if the certificate of the engineer could not be considered so much of the essence of the contract that the plaintiff would at common law have been entitled to rescind, yet that the fraudulent misconduct of the defendant company having made it impossible that the plaintiff company could have the full benefit of the contract, they were at liberty to rescind.(*t*)[1]

(*n*) Robson v. Drummond, 2 B. & Ad., 303.
(*o*) Palmer v. Temple, 9 A. & E., 508; Lovelock v. Franklyn, 8 Q. B., 371; Ford v. Tilley, 6 B. & C., 325
(*p*) Keyes v. Harwood, 2 C. B., 905.
(*q*) Planche v. Colburn. 8 Bing., 14.
(*r*) Panama,etc.,Telegraph Co. v. India-rubber, etc., Co. L. R. 10 Ch., 515.
(*s*) Panama, etc., Telegraph Co. v. India-rubber, etc., Co., L. R. 10 Ch., 532.
(*t*) Panama, etc., Telegraph Co. v. India-rubber, etc., Co , L. R. 10 Ch., 515.

[1] *Tender.*] A party agreed to pay a part of the purchase price by executing and delivering his bond, with a mortgage upon the land, and the balance in cash upon delivery of the deed upon a day specified. Defendant agreed to deliver the deed when so paid. The parties met; defendant produced a deed

bearing date the day the contract was executed; plaintiff produced and handed to defendant the bond and mortgage, and had a certified check for the cash to be paid; neither party made a tender. Defendant claimed that he was entitled to interest on the whole purchase money from the date of the contract; the matter was discussed and defendant left the room for consultation. Upon his return he offered to carry out the contract according to its terms. In an action to compel specific performance, held, that a formal tender was not necessary in order to maintain the action. The defendant having taken an untenable ground, if he changed his views, or receded from his position, he was bound to notify plaintiff, and his refusal to pass the title, except upon payment of the interest claimed, was a good excuse for not making a tender. Selleck v. Tallman, 87 N. Y., 106.

The possession must be exclusive and absolute.] The possession, in order to satisfy the statute, must be exclusive and absolute; must not be as a tenant in common or as a joint tenant; it must be actual, open and notorious. A merely technical possession will not answer. Elliott v. Thomas, 3 M. & W., 170; Mills v. Hunt, 17 Wend., 333; Smith v. Underdunk, 1 Sandf.'s Ch., 579; Jones v. Pease, 21 Wis., 644; Briggs v. Whisking, 25 Eng. L. and Eq., 257; Boutwell v. O'Keefe, 32 Barb., 434; McKnight v. Dunlop, 5 N. Y., 537.

Parol partition between several grantees.] Where there are several grantees of real property, a parol partition between themselves, if followed by actual possession, is sufficient to take the case out of the operation of the statute. Corbin v. Jackson, 14 Wend., 619; Piatt v. Hubbell, 5 Ohio, 243; Williams v. Pope, Wright, 406; Ebert v. Wood, 1 Bin., 216; Cummins v. Nutt, Wright, 713; Calhoun v. Hays, 8 Watts & Serg., 127; Wilday v. Bouney, 31 Miss., 644. This is not true, where possession is not taken. Shee v. Derrick, 2 Rich., 627. An action of ejectment was pending, and the parties verbally agreed to divide the property, each holding their respective shares in severalty; all entered into possession. Held, that "there is no substantial differences in principle between such an agreement when carried out by taking possession in severalty under it, and a parol partition of land between parties in possession and claiming title, accompanied and followed by possession by each party of the part conceded to him" Handy, J., in City of Natchez v. Vandernelde, 31 Miss., 706.

Division line, acceptance and possession under.] A disputed boundary line may be settled by an express parol agreement, where possession is immediately entered upon; the parties, in such a case, cannot afterwards, set up the statute of frauds as a defense. Boyd v. Graves, 4 Wheat., 513; Jackson v. Corlear, 11 Johns., 123; Jackson v. Dyeling, 2 Caines, 198; Davis v. Townsend, 10 Barb., 333; Lindsley v. Springer, 4 Harring. (Del.), 547; Fuller v. County Commr., 15 Pick., 81; Blair v. Smith, 16 Mo., 273; Kipp v. Norton, 12 Wend., 127; Adams v. Rockwell, 16 id., 285; Yorborough v. Abernathy, Meigs, 413.

Exchange of real property by parol possession.] "If the evidence shows an unequivocal and complete taking possession of one of the subjects of an exchange by the party owning the other subject, it strengthens the evidence of possession taken by the opposite party of the corresponding subject. Proof of possession that might seem weak and inconclusive in the case of a parol sale, is thus made convincing in the case of an exchange." Agnew, J., in Moss v. Culver, 64 Pa. St., 414; see, also, Johnson v. Johnson, 6 Watts, 370; Bennett v. Abrams, 41 Barb., 619; Cauldwell v. Carrington, 9 Pet., 86; Beebe v. Dowd, 22 Barb., 255; Parrill v. McKinney, 9 Gratt., 1; Reynolds v. Hewett, 27 Pa. St., 176. In Miles v. Miles, 8 Watts & Serg., 135, it was held, that notwithstanding each party did not take immediate possession of his allowance, yet a parol exchange of land might be valid.

Improvements to real property upon the faith that it will be presented.] Where there has been an actual delivery of possession, and valuable improvements made of which the donor had knowledge, a parol promise that land would be deeded to another will be specifically enforced. Freeman v. Freeman, 39 N. Y., 34; see, also, Haines v. Haines, 4 Md.'s Ch., 133; S. C., 6 Md., 435.

Improvements made on land of child under parol gift.] In order that a parol contract for the gift of land from a father to a son can be sustained, all the

acts necessary to its validity must have special reference to it, and not to anything else; the terms of the contract must be clearly settled. The fact that the father has called the land his son's property, is not alone sufficient. Hugh v. Walker, 12 Pa. St., 173; Cox v. Cox, 26 id., 373; Poorman v. Kilgore, id , 365; King v. Thompson, 9 Pet., 204; Eckert, v. Mace, 3 Penr. & Watts, 364; Shellhammer v. Ashbaugh, 83 Pa. St., 24; Sower v. Weaver, 84 id., 262. Where large expenditures have been made, which have resulted in the permanent improvement of the estate, in consideration of his parol promise to convey the same, and with his knowledge, in such case the court will enforce the promise. Young v. Glendenning, 6 Watts, 509; Willis v. Mathews, 46 Tex., 478; Lobdell v. Lobdell, 36 N. Y., 327; Moore v. Pierson, 6 Iowa, 279; Golhiarth v. Golhiarth, 5 Kan., 402; Bright v. Bright, 41 Ill., 101; Hardisty v. Richardson, 44 Md., 617; Lewis v. George, 33 Mich., 253; Atkinson v. Jackson, 8 Ind., 31; Sayler v. Eckhart, 1 Bin., 378; Davidson v. Davidson, 13 N. J. Eq., 246; France v. France, 8 id., 650; Laur v. Henry, 39 Ind., 414; see, however, Forward v. Armistead, 12 Ala., 124.

CHAPTER XXV.

OF THE LAPSE OF TIME.

§ **1041**. The lapse of time before application to the court for its interference to enforce an uncompleted contract, or the fact that the plaintiff has not performed his part of the contract at the time specified, may furnish grounds of defense to an action for specific performance.

§ **1042**. Before the judicature acts, the plaintiff in a common law court had to show that all things on his part to be performed had been performed within a reasonable time, or, where a time was specified in the contract, within the time so specified: and at common law time was thus always of the essence of the contract.(*a*) But in equity the question of time was differently regarded, for courts of equity discriminating between these formal terms of a contract, a breach of which it would be inequitable in either party to insist on as a bar to the other's rights, and those which were of the substance and essence of the contract,(*b*) and applying to contracts the principles which governed the interference of those courts in relation to mortgages,(*c*) held time to be *primâ facie* non-essential, and accordingly granted specific performance of contracts after the time for their performance had been suffered to pass by the party asking for the intervention of the court, if the other party had not shown a determination not to proceed.(*d*)[1] "When"

(*a*) Berry v. Young, 2 Esq , 640 n ; Wilde v. Fort, 4 Taunt. 334; Stowell v. Robinson, 3 Bing N. C., 928; Alexander v. Godwin 1 Bing N. C., 671; Vernon v. Stephens 2 P. Wms., 66; and cf. Noble v. Edwardes, 5 Ch. D , 378. Where a condition as to time is a mutual stipulation and not a condition precedent, the lapse of time is of course no bar to an action on the contract. Hall v. Cazenove, 4 East, 477; Havelock v. Geddes, 10 East, 555; Borneman v. Tooke, 1 Camp., 377; Lewis v Godwin. 3 Bing. N. C 737; Lamprell v Billericay Union, 3 Ex , 283.

(*b*) Parkin v. Thorold, 16 Beav., 59.

(*c*) See per Lord Eldon in Seton v. Slade, 7 Ves., 273.

(*d*) Pincke v. Curtis, 4 Bro. C. C., 329; Radcliffe v. Warrington, 12 Ves., 326. See per Lord Redesdale in Lennon v. Napper, 2 Sch. & Lef., 684; per Lord Romilly, M. R., and Lord Cranworth (when V. C.) in Parkin v. Thorold, 16 Beav., 59; 2 Sim N. S., 1; Baker v. Metropolitan Railway Co., 31 Beav., 504 (completion within a reasonable time).

[1] At law, where goods are to be delivered at a certain time, they must all be delivered at that time. Davenport v. Wheeler, 7 Cow., 231. And it must be impossibility, not difficulty, that will excuse a party from the performance of his agreement. Huling v. Craig, 2 Addis., 342. But although rigid enforce-

said Leach, V. C., "a court of equity holds that time is not of the essence of a contract, it proceeds upon the principle that, having regard to the nature of the subject, time is immaterial to the value, and is urged only by way of pretence and evasion."(*e*)

§ **1043**. Now, however, stipulations in contracts as to time or otherwise, which would not before the date of the commencement of the judicature act, 1873, have been decreed to be or to have become of the essence of such con-

(*e*) In Doloret v. Rothschild, 1 S. & S., 598.

ment is the feature of law, yet, in equity, the time of performance may be enlarged. Runnels v. Jackson, 1 How. (Miss.), 358; see Getchel v. Jewett, 4 Greenl., 350; Rogers v. Saunders, 16 Me., 92. The court will so modify the agreement as to do justice as far as the circumstances will permit and will refuse specific execution unless the party seeking it will comply with such modification as justice requires. Mechanics' Bank v. Lynn, 1 Pet., 376; Mitchell v. Nicholson, 6 Call, 308; see, also, Garnett v. Macon, 2 Brock., 185. And the time, mentioned in a contract of sale, for payment of the purchase money, is not generally of the essence of the contract; and the purchaser does not forfeit his purchase by neglect to pay at the day. Wells v. Wells, 3 Ired.'s Ch., 596; Runnels v. Jackson, 1 How. (Miss.), 358; Attorney-General v. Purmont, 5 Paige, 620; see Hepburn v. Auld, 5 Cranch, 262; Fletcher v. Wilson, 1 S. & M.'s Ch., 376; Brashier v. Gratz, 6 Wheat., 528. But time, it is said, is essential in a parol contract for the sale of land, in respect to the specific performance of it by a court of equity. Goodwin v. Lyon, 4 Port., 297. In Kentucky, the case of Smith v. Carney, 1 Litt., 295, expresses an essentially different doctrine from that which, judging from the weight of authority, is generally received as law. It is a case to be classed with the older English decisions. It was there held, that, it being a settled rule that equity will not decree specific execution of a contract where the law will not give damages, relief was denied on a verbal contract for the sale of land, made before the statute of frauds went into operation, as assumpsit alone could be maintained at law for a breach of the contract, and was barred by five years' delay, and more than that time had elapsed between the accruing of the cause of action and the commencement of the suit In cases where the jurisdiction of law and equity is concurrent, lapse of time is an absolute bar to a suit in equity, if it would be so at law. Humbert v. Rector of Trinity Church, 7 Paige, 195. In a valuable note to Seaton v. Slade, 7 Ves., 273, contained in White and Tudor's Leading Cases in Equity, the principles of equity in respect of time are very learnedly exhibited. "At law," it is there said, "an agreement for the sale of real estate confers a mere right of action on the vendee. In equity it does more, it vests an equitable estate, attended by most, if not all, the incidents of actual ownership. It necessarily follows that while a default in the literal fulfillment of the stipulations of such a contract will deprive the party by whom it is committed of all right of recovery at law against the other, it will not have that effect in equity, unless of such a nature as to render it inequitable to enforce the contract. Although, therefore, a party who has committed a default of a nature to be injurious, and which does not admit of compensation, will not be allowed to enforce the contract, even in equity; yet when the default is not injurious, or the injury which it produces can be compensated, equity will not consider it a sufficient reason for refusing to carry the contract into execution. 1 Dev. & Bat. Eq., 237. A default in point of time generally admits of compensation. Time is held, therefore, not to be material in itself in equity, although it may undoubtedly be so in its consequences. A failure to comply with the terms of a contract, on the day fixed for their fulfillment, will not, therefore, necessarily preclude the right to fulfill them afterwards, and apply to equity a corresponding fulfillment by the other party."

tracts in a court of equity, receive in all courts the same construction and effect as they would formerly have received in equity.(*f*) In other words, the doctrines and rules of equity as to the effect of of lapse of time are now applicable to and govern every contract that falls within the jurisdiction of any of the courts, superior or inferior,(*g*) of this country.

These doctrines and rules then we now proceed to consider.

§ **1044**. It is proposed to discuss the subject in hand under the following heads, viz.:—

(1) Cases where time was originally of the essence of the contract:

(2) Cases where time, though not originally of the essence of the contract, has been engrafted into its essence by subsequent notice:

(3) Cases where the delay has been so great as to constitute laches disentitling the party to the aid of the court, and evidencing an abandonment of the contract irrespectively of any particular stipulation as to time:

(4) Cases where time does not run:

(5) Cases where the objection on the ground of lapse of time is waived.

1. *Time originally of the essence of the contract.*

§ **1045**. Time is originally of the essence of the contract in the view of the court of equity, whenever it appears to have been part of the real intention of the parties that it should be so, and not to have been inserted as a merely formal part of the contract.(*h*)[1] As this intention may either be separately expressed, or may be implied from the nature or structure of the contract, it follows that time may be originally of the essence of a contract, as to any one or

(*f*) Jud. Act., 1873, s. 25 (7); Jud. Act, 1875, s. 10. Cf. Noble v. Edwards, 5 Ch. D., 378.

(*g*) See Jud. Act, 1873, s. 91.

(*h*) Hipwell v. Knight, 1 Y. & C. Ex., 401.

[1] Therefore the time of payment, in a contract for the sale of lands, may be made of the essence of the contract, and on a default, without excuse, or any acquaintance or waiver on the part of the vendor, equity will not aid the vendee. Reed v. Chambers, 6 Gill & J., 490. See Wells v. Smith, 2 Edw. Ch., 78; S. C., 7 Paige, 22; Smith v. Brown, 5 Gilm., 305. So where a certain act has been clearly stipulated to be done within a given time, as, for example, giving security, a party will not be relieved against his failure to perform the act at the time specified. Doar v. Gibbes, 1 Bailey's Ch., 371.

more of its terms, either by virtue of an express condition in the contract itself making it so, or by reason of its being implied. It will be convenient to consider the cases separately; premising, however, that the point that time is of the essence of the contract is one which should be made by the party insisting on it without delay.(*i*)[1]

(*i*) Monro v. Taylor, 8 Ha., 51, 62.

[1] *Time when a contract is complete.*] The time when the negotiation culminates in an agreement is often of importance. When the answer containing the acceptance of a distinct proposition, is dispatched by mail or messenger, if due dilligence is used, and no intimation that the offer has been withdrawn has been received, completes the contract. Adams v. Lindsell, 1 B. & A., 681; Mactier v. Frith, 6 Wend., 103; Levy v. Coke, 4 Ga., 1; Brisbane v. Boyd, 4 Paige's Ch., 17; Averil v. Hedge, 12 Conn., 426; Hamilton v. Lyeswing Ins. Co., 5 Pa. St., 339; Abbott v. Shepard, 84 N. H., 14; Stockton v. Stockton, 32 Md , 136; Chicago R. R. Co. v. Done, 43 N. Y., 260; Potts v. Whitehead, 20 N. J. Eq., 55; Kent's Com. (9th ed.), 640. The agreement is held to date from the posting, and not from the receipt of the letter. Potter v. Saunders, 6 Hare, 1; Brisbane v. Boyd, 4 Paige's Ch., 17; Vassar v. Camp, 11 N. Y., 441; Clark v. Dales, 20 Barb., 42; Falls v. Garther, 9 Porter, 605; Chiles v. Nelson, 7 Dana, 281; Levy v. Coke, 4 Ga., 1; Averil v. Hedge, 12 Conn., 424; Beckwith v. Cheever, 21 N. H., 41; Bryant v. Boone, 55 Ga., 438. *contra*, McCulloch v. Eagle Ins. Co., 1 Pick., 278; Hayer v. Middlesex Ins. Co., 10 Pick, 326; Gillespie v. Edmonston, 11 Humph., 553.

When time made a distinct feature of the contract.] It makes no difference what the nature of the subject matter is, the time for the performance of the agreement will be regarded, when the time of performance appears to have been made a distinct feature of the transaction. Ganetson v. Vanloon, 3 Iowa, 128.

Want of mutuality, time "of the essence."] Where there is a want of mutuality in the obligations arising from the transaction, in equity as well as at law, time is of the essence. Manghlin v. Perry, 35 Md., 352; Magoffin v. Holt, 1 Duvall, 95.

May stipulate that time shall be of the essence.] Baron Alderson said in Hipwell v. Knight, 1 Y. & C., 415: "I do not see therefore why, if the parties choose, even arbitrarily, to stipulate, provided both of them intend to do so, for a particular thing to be done at a particular time, such a stipulation should not be carried literally into effect in a court of equity. That is the real contract. The parties had a right to make it. Why, then, should a court of equity interfere, to make a new contract which the parties have not made?" See, also, Stow v. Russell, 36 Ill., 18; Benedict v. Lynch, 1 John.'s Ch., 370; Kemp v. Humphreys, 13 Ill., 573; Prince v. Griffin, 27 id., 514; Potter v. Tuttle, 22 Conn., 512; Baldwin v. Vanvorst, 10 N. J. Eq., 577; Earl v. Halsey, 1 McCarter (N. J. Ch.), 332; Grigg v. Landis, 21 N. J. Eq., 494; Fessler's App., 75 Pa. St., 483. Zabriskie, Ch., said in Bullock v. Adams, 20 N. J. Eq., 367: "A court of equity has no more right to disregard an express stipulation that time shall be of the essence of the contract, than it has to give a year, or ten years, or ninety-nine years, for the payment of the whole or of one-half of the purchase money stipulated for in cash, if it should appear that it is difficult or impossible for the purchaser to pay at the time agreed upon."

Stipulations as to time; examples.] The following cases will show the effect of stipulations as to time: Jones v. Noble, 3 Bush (Ky.), 694; Mason v. Payne, 47 Mo., 517; Mitchell v. Wilson, 4 Edm. Ch., 697; Heckord v. Sayre, 34 Ill., 142; Shuffleton v. Jenkins, 1 Morris (Iowa), 427; Reed v. Breeden, 61 Pa. St., 460; McClure v. King, 15 La. An., 220; Gale v. Archer, 42 Barb., 320; Troy v. Clarke, 30 Cal., 419. Walworth, Ch., said in Smith v. Wells, 7 Paige's Ch., 22; S. C., 2 Edm. Ch., 78: "Although, in theory, the interest is supposed to be a fair equivalent for the non-payment of money at the time agreed upon, we

§ **1016**. The Court of Chancery seems at one time to have gone so far in its disregard of time as to consider that it was of no consequence in equity:(*j*) and accordingly Lord Thurlow(*k*) seems to have maintained that no expression

(*j*) Gibson v. Patterson, 1 Atk., 12, which has been thought an erroneous report. See Lloyd v. Collett, 4 Bro. C. C., 469 n. (3).

(*k*) Gregson v. Riddle, cited by Romilly arg. 7 Ves., 268.

all know that, in point of fact, the persons to whom it is due, frequently sustain great losses in consequence of the disappointment which the legal rate of interest cannot compensate. On the other hand, it frequently happens that the perfecting of the title, and the delivery of the possession of the premises at the time contemplated by the purchaser, is of essential benefit to him, which cannot be compensated by damages which are ascertainable by the ordinary rules of computing damages. It would, therefore, not only be unreasonable, but entirely unjust, for any court to hold that parties, in making executory contracts for the purchase or sale of real estate, should not be permitted to make the time of performance an essential and binding part of the contract in equity, as well as at law, where, as in this case, the other party was fully apprised of the intention to insist upon a strict performance at the day. Here there was no such impossibility as might not have been foreseen and provided against by proper care and vigilance. Under such circumstances, if the property had very much increased in value after the making of the original contract, the defendant is fairly entitled to the benefit thereof under the agreement by which the complainant contracted to relinquish all claims upon the property, either at law or in equity, if he did not comply with the terms of the agreement at the day. And as there is nothing inequitable or unconscientious in her insisting upon this part of the contract, I think the vice-chancellor was right in not making a new contract for her, contrary to the understanding of both parties when they entered into this agreement." Land was sold under a written contract, which contained the following covenant: "In the event of failure to comply with the terms hereof by the party of the second part, the party of the first part shall be released from all obligations in law or equity to convey said property, and said party of the second part shall forfeit all right thereto." The vendee failed to make his payments without excuse, and a court of equity held that he could not be relieved from the consequences of his default. Rhodes, J., said: "Courts will not inquire into the motive, or the sufficiency of the motive, that induced the parties to contract that time should be essential in the performance of any of the agreements contained in the contract of purchase. But if it appears that the parties have thus contracted, courts of equity will not disregard the contract in order to give effect to some vague surmise that all the vendor intended to secure by the contract was the payment of the purchase money, with interest at some indefinite time." Grey v. Tubbs, 43 Cal., 359.

Time was held to be of the essence of the contract in the following cases: "In case of the failure of the said S. to pay the aforesaid sums of money at the dates aforesaid, or any part thereof, to the said L., his heirs or assigns, then the said S. shall forfeit to the said L. the sums already paid, and no deed shall pass for said land. Held, that time was of the essence of such a contract. Snider v. Lehnherr, 5 Oregon, 385; see, also, Westerman v. Means, 12 Pa. St., 97.

How time shall be reckoned.] Where the contract bore an impossible date—*e. g.*, February 30, the time was held to be reckoned from its delivery. Styles v. Wardle, 4 B. & C., 908.

To say time is regarded in this court, as at law, is quite impossible.] This is the language of Lord Eldon in Seton v Slade, 7 Ves., 265. Stipulations having reference to time merely, are construed liberally by courts of equity, unless it is distinctly made to appear that it was the design of the parties to make time of the essence." Brunfield v. Palmer, 7 Blackf., 227; Mathews v. Gillis, 1 Iowa, 24; Hoffman v. Hummer, 7 N. J. Eq., 263; Kirchwal v. Swope, 6 Monr., 532; Ewing v. Course, 6 Ind., 312; Keller v. Fisher, 7 id., 718; Jones

in the contract could make time of the original essence of it. Lord Kenyon, M. R., however, maintained the contrary:(*l*) Lord Thurlow's doctrine was doubted by Lord Eldon:(*m*) and accordingly express stipulations rendering time of the essence have repeatedly been maintained as valid and binding in equity,(*n*) in respect, for instance, of covenants for the renewal of leases,(*o*) and stipulation as to the time for payment of the deposit(*p*) or the balance of the purchase-money.(*q*)[1]

(*l*) Mackreth v. Marlar, 1 Cax, 259
(*m*) In Seton v. Slade, 7 Ves., 270.
(*n*) Hudson v. Bartram 3 Mad., 440; Lloyd v. Rippingale, cited 1 Y. & C. Ex., 410.
(*o*) Baynham v. Guy's Hospital, 3 Ves., 295.
(*p*) Honeyman v. Marryat 21 Beav., 14, 24.
(*q*) Barclay v. Messenger, 22 W. R., 522; 43 L. J. Ch., 449.

v. Robins, 29 Me., 351; Wolton v. Wilson, 30 Miss., 576; Younger v. Welch, 22 Tex., 417; Runnels v. Jackson, 1 How. (Miss.), 385; White v. Butcher, 6 Jones Eq., 231; Smote v. Rea, 19 Md., 398; Hannah v. Ratekin, 43 Ill., 462; Miller v. Miller, 25 N. J. Eq., 354; Converse v. Blumrich, 14 Mich., 109.

Stipulation as to time inserted as a penalty merely.] Where there is a stipulation that a party shall forfeit his rights under the contract in case of default, and it is clearly shown that such stipulation was inserted as a penalty merely, to induce more prompt performance of the contract, and where the party in default has given a reasonable excuse for the delay, and has acted throughout in good faith, and the other party has sustained no damage by the delay, specific performance will be decreed. Quinn v. Roath, 37 Conn., 16; see, also, Scarlett v. Stein, 40 Md., 512; Steele v. Branch, 40 Cal., 3; Moote v. Scrinen, 38 Mich., 500.

Time within which a contract is to be performed.] Formerly equity paid little attention to the mere want of punctuality, and carried the doctrine of relief to an extravagant length. Judge Story says, in Story's Eq. Juris., § 780: "Equity went beyond the true limits to which every jurisdiction should be confined, as it amounted to a substitution, *pro tanto*, of what the parties had not contracted for. But the tendency of the modern decisions is to bring the doctrine within such moderate bounds as seem clearly indicated by the principles of equity, and by a reasonable regard to the common accidents, mistakes, infirmities and inequalities belonging to all human transactions." See, also, Drew v. Hanson, 6 Ves., 678; Halsey v. Grant, 13 Ves., 76; Linton v. Potts, 5 Blackf., 396; Bowyer v. Bright, 13 Price, 702; Barnard v. Lee, 97 Mass., 92.

Time, how regarded at law?] At law, the plaintiff must show performance within a reasonable time; and in cases where the time is fixed, he must show performance within such time. Berry v. Young, 2 Esp., 640, n; McCulloch v. Dawson, 1 Cart. (Ind.), 413; Stowell v. Robinson, 3 Bing. (N. C.), 928; Wilde v. Fort, 4 Taunt., 334; Alexander v. Godwin, 1 Bing. (N. C.), 671; O'Kane v. Kiser, 25 Ind., 168.

Time, how regarded in equity?] Equity holds time to be *prima facie*, non-essential. Seton v. Slade, 7 Ves., 273; Radcliffe v. Warrington, 12 Ves., 326; Parkin v. Thorold, 16 Beav., 59; Pincke v. Curtis, 4 Bro. C. C., 329. In Peters v. Delaplaine, 49 N. Y., 367, Church, C. J., said: "The time within which actions may be brought for specific performance of contracts, has not been extended by implication by the statutes prescribing a time within which the action must, in all cases, be brought. The question still remains, and must be decided in each action, although brought within the statutory limit as to time, whether, under the peculiar circumstances, equity and good conscience require that the contract shall be specifically performed, or whether the party shall be left to his remedy at law for the non-performance." See, also, King v. Hamilton, 4 Pet. (U. S.), 311.

[1] It is clearly the rule that equity will not disregard the manifest intention of the parties. It is only required that they shall make time essential to induce

§ **1017**. In order to render time thus essential, it must be clearly and expressly stipulated, and must also have been really contemplated and intended by the parties that it shall be so: it is not enough that a time is merely mentioned during which or before which something shall be done.

§ **1018**. Therefore in a case where the contract, dated the 23d of October, was to grant a new lease "upon condition" of the intending lessee paying on or before the end of the month a premium of 1,000 guineas, Lord Eldon nevertheless refused (on an interlocutory application) to treat the period limited by the contract as essential, considering that, upon the facts of the case, the amount of the premium was really the only thing contemplated by the parties, and that there was nothing to show that payment at a particular day was the object.(*r*)

So, again, where a day was specified for the delivery of the abstract, it was held non-essential, although the purchaser upon its expiration immediately refused to proceed:(*s*) and in Parkin v. Thorold,(*t*) where a day had been specified for the completion of the contract, Lord Romilly, M. R., held it to be non-essential, though in so doing he differed from the previous observations of Lord Cranworth, made (when V. C.) in the same case at an earlier stage.(*u*)[1]

(*r*) Hearne v Tenant, 13 Ves., 287.
(*s*) Roberts v. Berry, 16 Beav., 31, affirmed 3 De G. M. & G., 284. Consider Venn v. Cattell, 27 L T., 469.
(*t*) 16 Beav., 50; but see the judgment of Jessel, M. R., in Barclay v. Messenger, 22 W. R., 522; 43 L. J. Ch., 499.
(*u*) Parkin v. Thorold, 2 Sim. N. S., 1. Distinguish Barclay v. Messenger, 22 W. R., 522; 43 L. J. Ch., 449.

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the court to so consider it. Scott v. Fields, 7 Ham., 90 (2d pt.); Benedict v. Lynch, 1 John.'s Ch., 370; Doar v. Gibbes, 1 Bailey's Ch., 371; Wells v. Smith, 7 Paige, 22 A most powerful argument in favor of the law, as it now stands, was made by Lord Loughborough in Lloyd v. Collett, 4 Bro. C. C., 469. "There is a difficulty," said his honor, "to comprehend how the essentials of a contract should be different in equity and at law. It is one thing to say the time is so essential that, in no case in which the day has been by any means suffered to elapse, the court would relieve against it and decree performance. The conduct of the parties, inevitable accident, etc., might induce the court to relieve. But it is a different thing to say the appointment of a day is to have no effect at all; and that it is not in the power of the parties to contract, that if the agreement is not executed at a particular time, they shall be at liberty to rescind it." "I want a case to prove that where nothing has been done by the parties, this court will hold, in a contract of buying and selling, the rule that the time is not an essential part of the contract. Here no step had been taken from the day of the sale for six months after the expiration of the time at which the contract was to be completed. If a given default will not do, what length of time will do? An equity arising out of one's own neglect! It is a singular head of equity!"

[1] Wells v. Wells, 3 Ired.'s Ch., 596; Runnels v. Jackson, 1 How. (Miss.), 368; Attorney-General v. Purmont, 5 Paige, 620. But in Benedict v. Lynch, 1

Lapse of time in payment of the purchase-money may generally be recompensed by interest and costs.(*v*)

§ **1049**. Time may be implied as essential in a contract, from the nature of the subject-matter with which the parties are dealing. "If, therefore," said Alderson, B.,(*w*) "the thing sold be of greater or less value according to the efflluxion of time, it is manifest that time is of the essence of the contract: and a stipulation as to time must then be literally complied with in equity as well as in law." In respect of reversionary interests, therefore, it is held to be of the essence of justice, that contracts for sale should be executed immediately and without any delay,(*x*) unless indeed the terms of the contract are such as to show that the parties contemplated the possible occurrence of a delay, and intended, in the event of that delay occuring, to keep the bargain alive.(*y*)[1]

§ **1050**. So, again, where the subject-matter is from its nature exposed to daily variation, the court inclines to hold time to be material, as in the sale of the stock in a public house,(*z*) in contracts for granting annuities on lives,(*a*) and in purchases of government stock.(*b*)[2]

(*v*) Vernon v. Stephens, 2 P. Wms., 66.
(*w*) In Hipwell v. Knight, 1 Y. & C. Ex., 416.
(*x*) Newman v. Rogers, 4 Bro. C. C., 391; Spurrier v. Hancock, 4 Ves., 667.
(*y*) Patrick v. Milner, 2 C. P. D., 348. See infra, § 1057.
(*z*) Coslake v. Till, 1 Russ., 376; Weston v. Savage, 10 Ch. D., 741.
(*a*) Withy v. Cottle, T. & R., 78.
(*b*) Doloret v. Rothschild, 1 S. & S., 590. See also Lewis v. Lord Lechmere, 10 Mod., 503

John.'s Ch., 370, a clause to the effect that *if the plaintiff failed in either of his payments the agreement was to be void*, was thought to be abundantly distinct, and to render time of the essence of the contract. See Mitchell v. Wilson, 4 Edw.'s Ch., 697.

[1] Time is of the essence of the contract wherever it appears material to the parties, and, therefore, where the value of the property has greatly diminished and injustice might be done, equity will not decree a specific performance. McKay v. Carrington, 1 McLean, 50. Therefore, in Pillow v. Pillow, 3 Humph., 644, where it was agreed between a judgment creditor and debtor, that the latter should pay the judgment in land, at a value to be fixed by persons designated, and the debtor defeated the performance of the agreement until his land had risen in value, it was held that he could not maintain a bill to compel a specific performance of the agreement. See, also, Holt v. Rogers, 8 Pet., 420. And where land has been purchased to sell, and such a purpose a lawful one, which may be considered by a court of chancery, time will be deemed of the essence of the contract. McKay v. Carrington, 1 McLean, 50; see Jones v. Robbins, 29 Me., 351.

[2] "It seems the doctrine of the court that in almost every case, except the purchase of lands in fee simple (but in that case only by express agreement; Sug. V. & P., 292), time will be considered as of the essence of a contract. The cases establish that it will be considered essential in the purchase of a house for residence (Levy v. Linds, 3 Mer., 81), or of lands or houses for the purposes of trade (Coslake v. Till, 1 Russ., 376; Walker v. Jeffreys, 1 Ha., 341),

§ **1051**. And so, again, where the object of the contract is a commercial enterprise, the court is strongly inclined to hold time to be essential, whether the contract be for the purchase of land for such purpose, or more directly for the prosecution of trade.(*c*) This principle has been acted on in the matter of a contract respecting land which had been purchased for the erection of mills,(*d*) and in several cases of contracts for the sale of public houses as going concerns.(*e*) For the purchaser of a public house presumably buys it for the purpose of carrying it on, and it would be ruinous to him if he were kept out of it.(*f*)

§ **1052**. The same principle applies with especial force to contracts relating to mines. The nature of all mining transactions is such as to render time essential: 'for no science, foresight, or examination can afford a sure guarantee against sudden losses, disappointments, and reverses, and a person claiming an interest in such undertakings ought therefore to show himself in good time willing to partake in the possible loss as well as profit.(*g*) 'So in several cases time has been held of the essence in contracts for the sale of mines and works.(*h*)

§ **1053**. Again, where the contract had relation to the supply of coal, and eleven months were allowed to elapse before filing the bill, the article being one fluctuating from day to day in its market price, the court held the delay a ground for declining its interference:(*i*) and where the contract contemplated the payment of moneys to be applied

(*c*) Walker v. Jeffreys, 1 Ha., 341, 348; Coslake v. Till, 1 Russ., 376.

(*d*) Wright v. Howard, 1 S. & S., 190

(*e*) Seaton v. Mapp, 2 Coll., 556 (where the essentiality of time was arrived at from the conditions as well as from the subject-matter); Day v. Luhke, L. R. 5 Eq., 336; Cowles v. Gale, L. R. 7 Ch., 12. See too judgment of Hall, V. C., in Weston v. Savage, 10 Ch. D., 741, and Claydon v. Green, L. R. 3 C. P., 511.

(*f*) Per James, L. J., in Cowles v. Gale, L. R. 7 Ch., 15.

(*g*) Per Knight Bruce, L. J., in Prendergast v. Turton, 1 Y. & C. C. C., 110, and in Clegg v. Edmondson, 8 De G. M. & G., 814.

(*h*) Parker v. Frith, 1 S. & S., 199 *n.*; per Lord Eldon in City of London v. Mitford, 14 Ves., 58; Walker v. Jeffreys, 1 Ha., 341; Alloway v. Braine, 26 Beav., 575; and cf. Eads v. Williams, 4 De G. M. & G., 674; Clegg v. Edmondson, 8 Ib. 787; Huxham v. Llewellyn, 21 W. R., 570, 766; Glasbrook v. Richardson, 23 W. R., 51; infra, § 1078.

(*i*) Pollard v. Clayton, 1 K. & J., 462; per Lord Redesdale in Crofton v. Ormsby, 2 Sch. & Lef., 604. Cf. Huxham v. Llewellyn, 21 W. R., 570, 766; infra, § 1079.

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in dealing for reversionary interests (Newman v. Rogers, 4 B. C. C., 391), or concurrent leases (Carter v. Dean of Ely, 7 Sim., 211), where the contract is for the grant of an annuity for the life of an individual (Withy v. Cottle, T. & R., 81), and in covenants to renew leases for lives or years (Eaton v. Lyon, 3 Ves., 690), where the contract relates to stock in the public funds (Forrest v. Elwes, 4 Ves,, 492), or where there is a reference to arbitrators as to the price (Morse v. Merest, 6 Mad., 27), or where the vendors are an ecclesiastical corporation or other fluctuating body. Carter v. Dean of Ely, *ubi sup.*" Batten Spec. Per., 126, 127; see Southern Life Ins. Co. v. Cole, 4 Flor., 359.

towards obtaining patents, time was from the nature of the object in view held to be of the essence.(*j*)

§ **1054**. So, again, where a contract specified a time by which calls were to be paid up, or in default the shares were to be forfeited;(*k*) and where a contract gave an option to be exercised before a certain time to convert loan notes into shares:(*l*) in both these cases time was from the nature of the subject-matter of the contract held to be essential.

§ **1055**. The case of Macbride v. Weekes(*m*) is a strong illustration of this principle; for there the plaintiff by the contract undertook to purchase a field adjoining his own, to procure an assignment of a term, and to do other things which usually require time: but the nature of the subject-matter of the contract, which was a colliery, was held to make time of the essence of the contract, to the extent of rendering it incumbent on the vendor to use his utmost diligence in completing the contract, and giving the purchaser a right to decline completing, if the vendor failed in so exerting himself. In this case the purchaser, after little more than two months had elapsed from the date of the contract, gave the vendor notice that, unless he completed it within another month, the purchaser would rescind, and the time so limited by the purchaser was held to be, under the circumstances, reasonable.

§ **1056**. The essentiality of time may also be implied from the surrounding circumstances connected in each case with the particular contract.(*n*) Thus where a man purchasing a house with the object of immediately occupying it as his own residence stipulated in the contract that possession should be given on a specified day, and the vendor failed to show a good title by that day, it was held that the stipulation as to time was of the essence of the contract,(*o*) and the vendor, though he offered actual possession, failed to enforce specific performance.(*p*) Possession in such a contract means possession with a complete title previously shown.(*q*)

(*j*) Payne v. Banner, 15 L. J. Ch, 227.
(*k*) Sparks v. Liverpool Waterworks Co., 13 Ves., 428.
(*l*) Campbell v. London & Brighton Railway Co, 5 H. A., 519, 529.
(*m*) 22 Beav., 533, 539; cf. Huxham v. Llewellyn, 21 W. R., 570, 766; and, as to the notice, infra, § 1062 et seq.
(*n*) Per Turner, L J., in Roberts v. Berry, 3 De G. M. & G., 291.
(*o*) See Gedye v. Duke of Montrose, 26 Beav., 45.
(*p*) Tilley v. Thomas, L. R. 3 Ch., 61.
(*q*) Per Rolt L. J., L. R. 3 Ch., 68. As to 'possession,' see also Lake v. Dean, 28 Beav., 607.

§ **1057**. The later case of Webb v. Hughes(*r*) is not at variance with this principle, but illustrates a limitation of it. There, too, the house and land, the subject-matter of the contract, were required by the purchaser for immediate residential occupation, but the conditions of sale after naming a day for completion went on to provide that if, from any cause whatever, the purchase should not then be completed, the purchaser should pay interest on the unpaid purchase-money from that day until the actual completion of the purchase; and it was accordingly held that, inasmuch as parties to the contract evidently contemplated the possibility of the completion being postponed beyond the day named, time was not of the essence. The *ratio decidendi* of this case is obviously applicable whatever the nature of the subject-matter of the contract, and it has accordingly been applied even to the sale of a reversionary interest.(*s*)[1]

§ **1058**. Again, where the members of a company in general meeting agreed to certain conditions on which dissenting members should be allowed to retire from the company, and one of those conditions fixed a date by which the option to retire was to be declared, the House of Lords held that that date was so essential a part of the arrangement, that the directors had no power to allow any member to

(*r*) L. R. 10 Eq., 281. (*s*) Patrick v. Milner, 2 C. P. D., 342.

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[1] *Where no time has been designated.*] An action for specific performance cannot be maintained, where no time has been designated for the performance of the contract. Potts v. Whitehead, 20 N. J. Eq., 55.

Contracts for the sale of real estate; time not usually "of the essence."] In such cases the intent usually is, that the purchase shall be completed within a reasonable time under the surrounding circumstances of the case. Rader v. Neal, 13 W. Va., 374; Chadwell v. Winston, 3 Tenn. Ch., 110; Abbott v. L'Hommedien, 10 W. Va., 677.

Parol proof that time was "of the essence."] In an action for specific performance, parol evidence may be introduced to show that time was to be considered as of the essence of the contract when it was made. King v. Ruckman, 20 N. J. Eq., 316.

When performance within a given time material.] Time is of the essence, where the other party would be seriously injured by a non-performance within the stipulated time. Doar v. Gibbes, Bailey's Eq., 371. Or, whenever from change of circumstances, a performance, which would alone answer the ends of justice, has become impossible. Pratt v. Low, 9 Cranch, 466; Longworth v. Taylor, 1 McLean, 395; Garnett v. Macon, 6 Call., 308. See as examples where time was held material, Hipwell v. Knight, 1 Y. & C. Ex., 401; Newman v. Rogers, 4 Bro. C. C., 391; Merritt v. Brown, 19 N. J. Eq., 286; Gall v. Archer, 42 Barb., 320; Edwards v. Atkinson, 14 Tex., 373.

retire who had not declared his option within the limited time.(*t*)

§ **1059**. Where hardship would result from considering time immaterial, as where delay in completion would involve one of the parties in a serious liability or loss, the court will incline to consider time as being of the essence. Thus where a tenant, without any definite interest, agreed for the sale of his goodwill and business to a purchaser to be completed on the 25th of March, that day was considered essential, inasmuch as if the contract were not then completed, the vendor might render himself liable as tenant for the ensuing year.(*u*) And so, again, where the body to participate in the purchase-money, being a chapter, was liable to variation, non-payment of the consideration money at the specified time was held fatal to the subsistence of the contract.(*v*)[1]

§ **1060**. Where the vendor stipulates that time shall be of the essence in respect of some of the conditions in his favor, the court inclines to hold it essential in respect of others also against him. Vendors so stipulating for the essentiality of time in their favor, "cannot fairly," said Knight Bruce, V. C., "complain of being held strictly to the conditions themselves * * * The plaintiffs' proposition is that the purchaser shall be held by a cable, and the vendors by a skein of silk."(*w*) Accordingly where it was, by one clause of the contract, provided that the vendors should deliver the abstract to the purchaser within twenty-one days from the date of the contract, and by another clause, that the purchaser should send in his requisitions within twenty-eight days from the delivery of the abstract, and in this respect time should be of the essence of the contract; and the vendors did not deliver the abstract until more than two months after the date of the contract; the court refused to hold the purchaser bound to comply with

(*t*) Houldsworth v. Evans, L. R. 3 H. L., 263

(*u*) Coslake v. Till, 1 Russ., 376; Wells v Maxwell (No. 1), 32 Beav., 408, affirmed 33 L. J. Ch., 44, 11 W. R., 842; Green v. Sevin, 13 Ch. D., 589; Roberts v. Perry, 3 De G. M. & G., 292; St. Leon Vend., 227.

(*v*) Carter v Dean of Ely, 7 Sim., 211.

(*w*) Seaton v. Mapp, 2 Coll., 556, 564.

[1] Doar v. Gibbes, 1 Bailey's Ch., 371; Colcock v. Butler, 1 Dessau., 307, where the court refused to decree specific performance of a contract for the sale of a house, where there had been a delay of eight months in completing the house, which had greatly depreciated in the meantime. See Jackson v. Edwards, 22 Wend., 498.

the stipulation as to the time for sending in requisitions, holding that, in such a case, the time for taking the objections, and the mode in which they are to be considered as waived, should depend upon the general principles of the court.(*x*)

§ **1061**. Where the contract contains stipulations in favor of one party and not of the other,—as, for instance, an option,—or is in anywise unilateral, the court, if it does not consider time as originally of the essence, will, as we shall hereafter see, look at it with more than usual strictness.(*y*)

2. *Time engrafted by notice.*

§ **1062**. Where time was not originally of the essence of the contract, but one party has been guilty of gross, vexatious, unreasonable, or unnecessary delay or default in relation to it, the other party becomes entitled to limit a reasonable time within which the contract shall be perfected by the other; and in default of obedience to such notice the court will not enforce specific performance, but will leave the parties to their strictly legal rights.(*z*)[1] It is to be observed that it is only when such delay or default has happened that this right occurs. There is no general right in either party to limit a time.

§ **1063**. This beneficial principle is of comparatively recent introduction. In a case before Leach, V. C., in 1821, he did not consider it to be then decided that time could thus be made essential by subsequent notice;(*a*) and where clear notice had been given that a purchaser would insist on completion by the time specified, Lord Erskine had previously refused to consider time as of moment in the contract.(*b*) But the principle is now well established.

§ **1064**. It is not, of course, possible for either party arbitrarily and suddenly to put an end to negotiations as to title,(*c*) or other matters pending between the parties. The time specified by the notice must be reasonable; *i. e.* long

(*x*) Upperton v. Nickolson, L. R. 6 Ch., 436.
(*y*) See infra, § 1073. As to the exercise of options, see Moss v. Barton, L. R. 1 Eq., 474 (lease), and Austin v. Tawney, L. R. 2 Ch., 143 (purchase).
(*z*) Taylor v. Brown, 2 Beav., 180; Benson v. Lamb, 9 Beav., 502; Nokes v. Lord Kilmorey, 1 De G. & Sm., 444.
(*a*) Reynolds v. Nelson, 6 Mad., 18.
(*b*) Radcliffe v. Warrington, 12 Ves., 326.
(*c*) Taylor v. Brown, 2 Beav., 180; Green v. Sevin, 13 Ch. D., 589.

[1] Wiswall v. McGowan, 1 Hoff.'s Ch., 125, expresses precisely this principle.

enough for the proper doing of the things required to be done:(*d*) if it be not so (and the question of reasonableness must be determined as at the date when the notice is given[*e*]), the notice will fail in engrafting time into the essence of the contract. Thus, in one case, six weeks, being a less time than the vendor took to furnish the abstract, were held to be an unreasonably short time for the vendor to insist on the purchaser's completing, and the notice was therefore inoperative;(*f*) in another case, fourteen days were held not to be a reasonable time within which to require the plaintiffs to produce a deed and complete the title;(*g*) and, in another, where, after negotiations as to the title had been going on for upwards of three years, the purchaser gave notice that, unless a good and marketable title were shown and made out within five weeks he would treat the contract as at an end, the notice was held held unreasonable and bad.(*h*)

§ **1065**. But where a vendor has previously refused to remove an objection, a time which would be unreasonably short in the first instance for the removal of it may then become a reasonable period, after which the purchaser may treat the contract as rescinded.(*i*)

§ **1066**. Again, where a notice to rescind was waived in case evidence requisite to prove the title was produced immediately, the evidence not having been produced, the bill was dismissed.(*j*)

§ **1067**. And the nature of the contract rendering expedition obligatory, may make reasonable a notice which would otherwise be too short. Thus, where A. agreed to grant B. a mining lease, and for that purpose undertook to buy a field adjoining his own, to procure an assignment of

(*d*) King v. Wilson, 6 Beav., 124; but see Macbryde v. Weekes, 26 Beav., 533; supra, § 1055

(*e*) Crawford v. Toogood, 13 Ch. D., 153.

(*f*) Pegg v. Wisden, 16 Beav., 239.

(*g*) Parkin v. Thorold, 16 Beav., 59 (cf. S. C., 2 Sim. N. S. 1). See too Wells v. Maxwell (No. 1), 32 Beav., 408, affirmed 33 L. J. Ch., 44, 11 W. R., 842; Green v. Sevin, Crawford v. Toogood, ubi supra

(*h*) McMurray v. Spicer, L. R. 5 Eq., 527.

(*i*) Nott v. Riccard, 22 Beav., 307.

(*j*) Stewart v. Smith, 6 Ha., 222 n. (Leach, V. C.)

[1] Brashier v. Gratz, 4 Wheat., 528; Rogers v. Saunders, 16 Me., 92; Hatch v. Cobb, 4 John., 559; Bunnington v. Israel, 7 Ohio, 97, and Jackson v. Logan, 3 Leigh, 161, are all cases to the effect that a vendor may determine the contract by an express notice that he will consider it at an end, unless the default of the vendee be made good by an immediate payment; but Higby v. Whitaker, 8 Ohio, 198, is an authority to the effect that the contract may be thus determined, without notice, and when the presumption of abandonment is repelled by actual possession.

a term, and do further acts requiring time, and nine weeks elapsed from the contract without any communication from A. to B. to show when the contract was likely to be completed, and B. then gave A. notice to complete within one calendar month, and in default to rescind the contract; it was held that the nature of the subject-matter of the contract rendered expedition on the part of the lessor essential, and that the month's notice was reasonable.(*k*)

§ **1068**. The notice to engraft time into the contract must be distinct, and unequivocal: thus, a notice that one party would consider the non-performance by a certain day as equivalent to a refusal to perform, was held not to amount to a notice that the contract would then be considered as rescinded.(*l*) The notice should, for certainty, be confined to the next act to be done by the party to whom it is given [1]

§ **1069**. It does not appear to be necessary that the notice should be in writing: for this purpose statements made by the purchaser's agent at the time of signing the contract, to the effect that time was essential, were in one case admitted as evidence.(*m*)

3. *Lapse of time constituting laches or evidencing abandonment of contract.*

§ **1070**. The Court of Chancery was at one time inclined to neglect all consideration of time in the specific performance of contracts for sale, not only as an original ingredient in them, but as affecting them by way of laches.(*n*) But it is now clearly established, that the delay of either party(*o*) in not performing its terms on his part, or in not prosecu-

(*k*) Macbryde v. Weekes, 22 Beav., 533.
(*l*) Reynolds v. Nelson, 6 Mad., 18.
(*m*) Nokes v. Lord Kilmorey, 1 De G. & Sm., 444. In that case the purchaser was defendant. Whether this makes a difference, query. See per Knight Bruce, V. C., 458.
(*n*) See supra, § 1046.
(*o*) Rich v. Gale, 24 L. T. (N. S.), 745.

[1] *Demand of performance before action for specific performance.*] The court said in Shvets v. Andrews, 2 Blackf., 274, that a demand for conveyance "is best calculated to secure the specific execution of contracts, and to prevent a multiplicity of suits. Besides, it may be often a convenience to the purchaser, for a variety of reasons, not to receive the title as soon as he is entitled to it; and he may, therefore, prefer its continuance for some time in the vendor. If he can obtain the title to which he has a right whenever he may choose to demand it, he ought not to complain." See, also, Hubbell v. Van Schoening, 49 N. Y., 326; Delavan v Duncan, id., 485; Gall v. Archer, 42 Barb., 320; Wright v. Le Clain, 4 Green (Iowa), 420; Kimble v. Tooke, 70 Ill., 553; Crabtree v. Levings, 53 id., 526; Walker v. Douglass, 73 id., 445; Brown v. Hart, 7 Blackf., 429; Bowen v. Jackson, 8 id., 203; Mather v. Scoles, 35 Ind., 1; Fairbanks v. Dow, 6 N. H., 266.

ting his right to the interference of the court by the institution of an action, or, lastly, in not diligently prosecuting his action when instituted,(*p*) may constitute such laches as will disentitle him to the aid of the court, and so amount, for the purpose of specific performance, to an abandonment on his part of the contract.[1]

(*p*) Moore v. Blake, 1 Ball & B., 62.

[1] Courts of equity will not aid in enforcing stale demands, where the party has been guilty of negligence, and has slept upon his rights. Piatt v. Vattier, 9 Pet., 405; Hawley v. Cramer, 4 Cow., 717; Coleman v. Lyne, 4 Rand., 434; Johnson v. Johnson, 5 Ala., 90; Atwater v. Fowler, 1 Edw Ch , 417; Richardson v. Baker, 5 Call, 514; Craig v. Leiper, 2 Yerg., 193. But it is said that lapse of time is permitted in equity to defeat an acknowledged right, only on the ground of raising a presumption that the right has been abandoned; and this presumption will never prevail against opposing facts and circumstances outweighing it. Nelson v. Carrington, 4 Munf., 332; Reardon v. Seary, 1 Litt., 53. And, in Ohio, lapse of time is no bar to a claim where an action of debt would not be barred by the statute of limitations. Fahs v. Taylor, 10 Ohio, 104; See Larrone v. Beam, id., 498 It seems clear, that where nothing is to be done by one to entitle him to specific performance of a contract, lapse of time does not constitute a defense by him to a bill for that purpose, as in case of a bond conditioned to make title as soon as the obligor shall get one. Koen v. White, Meigs, 358. And delay, amounting even to apparent negligence, may, it would appear, be explained; and under special circumstances, as where there is a difficulty about the title, it presents no bar to relief in equity. King v. Morford, Saxton, 274; Aylett v. King, 11 Leigh, 486; Nelson v. Carrington, 4 Munf., 332; see, also, Coulson v. Walton, 9 Pet., 62. Thus, the coverture of a female complainant, during a great portion of the time of delay, is a circumstance accounting for and excusing the delay. Baker v. Morris, 10 Leigh, 284. In Tate v. Greenlee, 2 Hawks, 486, where the complainant was married in her infancy, but immediately on the death of her husband, asserted her rights, although thirty-five years after the cause of her complaint had accrued, the same doctrine was repeated, and her bill sustained. See, also, Falls v. Torrance, 2 Hawks, 490. Again, where a turnpike company contracted for the purchase of land, and took possession and occupied the land, for the purposes of the company, twenty-three years, the contract was specifically enforced at the instance of the company. New Barbadoes Toll Bridge v. Vreeland, 3 Green's Ch., 157. Upon these same grounds was based the decision in Craig v. Leiper, 2 Yerg., 193. In that case the importance of promptitude was acknowledged, but it was considered sufficient explanation that a part of the delay had been occasioned by the mutual agreement of the parties, and the residue, with the exception of three years, by the insanity of the complainant's ancestor who made the contract. The bill was sustained, notwithstanding a delay of thirty years. Poverty, however, is no excuse. Perry v. Craig, 3 Miss., 316.

Rule where there has been considerable delay.] In such a case either party, when asking specific performance, must satisfy the court that during the whole time he was ready, and intended to fulfill; and that the delay was not in order to take advantage of a possible change in value of the property. Tiernan v. Roland, 15 Pa. St., 429; see, also, O'Fallon v. Kennerly, 45 Mo., 124.

Considerable change in value of the property pending delay.] The parties will be left to their remedy at law, where they cannot be placed in the situation which they would have occupied had the contract been originally carried out, and the value of the property is materially changed. Boston R. R. Co v. Bartlett, 10 Gray, 384; Brashier v. Gratz, 6 Wheat., 528; McKay v. Carrington, 1 McLean, 50; Demorest v. McKee, 2 Grant's Pa. Cas., 248; Finch v. Parker, 49 N. Y., 1; Delavan v. Drum, 49 id., 485; Peters v. Delaplane, id., 362; Cluner v. Saratoga Co. Bank, 47 How. Pr., 376; Callen v. Ferguson, 29 Pa. St., 247;

§ **1071**. One of the earliest cases tending to establish this principle was Mackreth v. Marlar(*q*) before Lord Kenyon, M. R.: Lord Loughborough followed it, and held in one case where a vendor delivered no abstract on or before the day for completion, nor till after an action for the deposit, and the purchaser had demanded back his deposit at the

(*q*) 1 Cox, 259.

Pickering v. Pickering, 38 N. H., 400; Ruckman v. Cing; 19 N. J. Eq., 360; Johns v. Norris, 22 id., 102; Pratt v. Carroll, 8 Cranch, 471; Roby v. Cassitt, 78 Ill., 638; Jackson v. Edwards, 22 Wend., 498.

Excuse for delay on the part of the vendee.] Equity will not refuse its aid in a case where the vendee has made delay in payments, but such delay has not operated injuriously, and the condition of the parties is the same as if payment had been promptly made: particularly where a reasonable excuse is made for the default. Longworth v. Taylor, 1 McLean, 395; Spaulding v. Alexander, 6 Bush (Ky.), 160; Pennock v. Ela, 41 N. H., 191; Morgan v. Scott, 26 Pa. St., 51; Gallaway v. Ban. 12 Ohio, 354; Williston v. Williston, 41 Barb., 635; Trimble v. Elliott, Wright, 310; Farris v. Bennett, 26 Tex., 568; Hubble v Van Schoening, 49 N Y , 326; Barnard v. Lee, 97 Mass., 92; Ewens v. Gordon, 49 N H., 444. In Coulson v. Walton, 9 Pet. (U. S.), 62, it was held, that in a case where the complainant had made no default, and had made an attempt to enforce his agreement, that a great lapse of time was not a sufficient bar to prevent a court of equity from decreeing specific performance.

Great delay unexcused, laches.] It is now well-settled, that where there is great unexplained delay on the part of any of the parties to an agreement, that this will constitute an abandonment of the same, and will amount to such laches as will bar a court of equity from decreeing specific performance. An unjustified default is equivalent to a rescision. Getchell v. Jewitt, 4 Me., 350; King v. Hamilton, 4 Pet , 311; De Cardova v. Smith, 9 Tex., 120; Haughwort v. Murphy, 2 N J. Eq., 118; Morgan v. Bergen, 3 Neb., 209; Vangant v. Mayor of New York, 8 Bosw., 375; Sarter v. Gordon, 2 Hill's Ch., 121; Ludlow v. Cooper. 13 Ohio, 552; Grundy v Wilson, Litt. Sel. Cas , 129; Higby v. Whittaker, 8 Ohio, 198; Richardson v. Baker, 5 Call., 514; Smith v. Hampton, 13 Tex., 459; Hemphill v. Miller, 16 Ark., 271; Lawrence v. Lawrence, 2 N. J. Eq., 317; Miller v. Henlan, 51 Pa. St., 265; Childress v. Holland, 3 Hayw , 274; Kerby v. Harrison, 2 Ohio St., 326; Merritt v. Brown, 2 N. J. Eq., 401; Maddox v. McQueen, 3 A. K Marsh., 400; Callon v. Ferguson, 29 Pa. St., 247; Dubois v. Baum, 46 id., 537; Marston v. Humphrey, 24 Me , 513; Shortall v. Mitchell, 57 Ill , 161; Hough v. Coughlan, 41 id., 131; Hedenburgh v. Jones, 73 Ill., 148; Taylor v. Merrill, 55 id., 52; Fitch v. Harding, 73 id., 114; Alexander v. Hoffman, 70 id., 114; Fitch v Willard, 73 id., 92. Where the vendor attempts to resell the property, or exercises unequivocal ownership over it unexplained, this will imply an abandonment of the contract. Garnet v. Macon, 6 Call., 308. An action for specific performance was held to be based on the ground that the delay constituted laches Thirty-seven years, Ewing v. Beauchamp, 6 B. Monr., 422; thirty-four years, Tate v. Conner, 2 Dev.'s Eq , 224; thirty years, Ritson v. Dodge, 33 Mich., 463; twenty years, Baird v. Baird, 5 J J. Marsh., 580; Williams v. Hart, 116 Mass., 513; eighteen years, Johnson v. Mitchell, 1 A. K. Marsh., 225; eight years, Brink v. Steadman, 70 Ill., 241 In Huffner v. Dickson, 2 Har. & Johns., 46, twenty-seven years was held to be no bar in an action for specific performance.

Specific performance, delay.] A party bought shares in a corporation from a member of a firm and received an authority authorizing a transfer on the books of the corporation. The seller at that time owned a large number of shares. The purchaser delayed for several months in applying for a transfer of his shares, and during the delay all the shares owned by the seller were sold to other parties, who obtained transfers. The shares had in the meantime risen in value. Held, that the purchaser could not in equity demand that a member

date for completion, that there was evidence of an abandonment of the contract by the vendor.(*r*) These cases were approved by Lord Alvanley, M. R.;(*s*) and finally the doctrine in question was adopted and acted on by Lord Eldon: thus, for example, in one instance he on this ground discharged a purchaser under a decree, error having been shown in the decree, though the parties were proceeding to rectify it.(*t*)

§ **1072**. The doctrine of the court thus established, therefore, is that laches on the part of the plaintiff (whether vendor or purchaser), either in executing his part of the contract or in applying to the court, will debar him from relief. "A party cannot call upon a court of equity for specific performance," said Lord Alvanley, M. R.,(*u*) "unless he has shown himself ready, desirous, prompt and eager;" or, to use the language of Lord Cranworth,(*v*) "specific performance is relief which this court will not give, unless in cases where the parties seeking it come promptly, and as soon as the nature of the case will permit."(*w*)

§ **1073**. Where the contract is in anywise unilateral, as,

(*r*) Lloyd v. Collett, 4 Bro. C. C., 469; Harrington v. Wheeler, 4 Ves., 686.
(*s*) Fordyce v. Ford, 4 Bro. C. C. 494.
(*t*) Lechmere v. Brazier, 2 J. & W., 287; Coster v. Turner, 1 R. & My., 311. See also Cubitt v. Blake, 19 Beav., 454.
(*u*) In Milward v. Earl Thanet, 5 Ves., 720 n.
(*v*) In Eads v. Williams, 4 De G. M. & G., 691.
(*w*) See also Alley v. Deschamps, 13 Ves., 225; Williams v. Williams, 17 Beav., 213; Firth v. Greenwood, 1 Jur. N. S., 866 (Wood, V. C.); Mills v. Haywood, 6 Ch. D., 202.

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of the firm who sold the shares, but who was ignorant of the transaction, should deliver shares of the same character owned by him. Held further, that the purchaser was entitled to a decree for the amount which he had paid for the shares. Winsom v. Fenno, 129 Mass., 405.

Example of great delay.] See Holt v. Rogers, 8 Pet. (U. S.), 420. And where there was not only delay, but failure of proof. Colvert v. Nichols, 8 B. Mon., 264.

Delay by consent.] It will, of course, operate as a defense where a party can show that the delay was acquiesced in, or that the other party has accepted a substitute for a literal performance. Hutchinson v. McNutt, 1 Ohio, 14; Koen v. White, Meigs (Tenn.), 358; Mitchell v. Long, 5 Litt., 71.

Example of waiver of payment.] The vendee of real estate was distinctly recognized by the vendor as the owner; said vendee was asked to refund a year's tax the vendor had paid for the year subsequent to the time fixed for the completion of the contract. Held, that it might be inferred that the time of payment was waived. Mix v. Baldne, 78 Ill., 213.

Waiver, where there had been both delay and depreciation.] The vendor accepted payment, and gave a receipt for the same, notwithstanding there had been delay as to a portion of the payment and depreciation as to value. Held, that the delay was waived. Hale v. Wilkinson, 21 Gratt., 75. This case is cited and followed in Ambrose v. Keller, 22 Gratt., 769.

for instance, in the case of an option to purchase, a right of renewal, or of any other condition in favor of one party and not of the other, then any delay in the party in whose favor the contract is binding is looked at with especial strictness.(*x*) On this principle, the delay of a purchaser in deciding whether he will or will not accept the title is an injustice, because the purchaser can enforce the contract against the vendor whether the title be good or bad, whereas the vendor can only do so in case of a good title.(*y*)[1]

§ **1074**. So where a railway company agreed to make such crossings as the landowner's surveyor should within one month direct and notify in writing to the company or their engineer, and the surveyor did not give any such direction or notification until after the expiration of the stipulated time, it was held that the landowner's right to have the crossings made under the contract was lost.(*z*)

§ **1075**. But where no time has been originally limited within which a tenant's option to have a lease must be exercised, and the landlord has never called upon the tenant to declare his option, mere lapse of time will not preclude the tenant(*a*) or his assignee(*b*) from exercising it.

§ **1076**. Acquiescence in the breach of a covenant will form a bar to its specific performance in equity.(*c*)

§ **1077**. In many of the cases there has been a general dilatoriness in all the proceedings, so that it is almost impossible to state briefly the actual amount of delay which has been considered to bar the plaintiff's right to relief: but some notion of the present doctrine of the court on this point will be gained from the following cases.[2]

(*x*) Allen v. Hilton, 1 Fonbl. Eq., 432; Brooke v Garrod, 3 K. & J., 62; Lord Ranelagh v. Melton, 2 Dr. & Sm., 278; Weston v. Collins, 13 W. R., 510. Distinguish Ward v. Wolverhampton Waterworks Co., L. R. 13 Eq., 243, and see Austin v. Tawney, L. R. 2 Ch., 143, where the necessity of strict compliance with the terms of option as to time was recognized, and held to have been satisfied.

(*y*) Spurrier v. Hancock, 4 Ves., 667, 672-673.

(*z*) Earl of Dernley v. London, Chatham and Dover Railway, 1 De G. J. & S., 204, 3 ib. 24, L. R. 2 H. L. 43.

(*a*) Moss v. Burton, L. R. 1 Eq., 474.

(*b*) Buckland v. Papillon, L. R. 2 Ch., 67.

(*c*) Barrett v. Blagrave, 6 Ves., 104.

[1] See, also, Lloyd v. Collet, 4 Bro. C. C., 469; Harrington v. Wheeler, 4 Ves., 686; Guest v. Homfray, 5 id., 818; Walker v. Jeffreys, 1 Ha., 352; Southcomb v. Bishop of Exeter, 6 id., 213; Dorin v. Hawey, 15 Sim., 49.

[2] *Option to purchase.*] In such a case, delay on the vendee's part will be regarded with suspicion. The conduct of the party claiming the benefit of such a contract will be closely scaned, and the court will exercise its discretion with great care. Allen v. Hilton, 1 Fonbl. Eq., 432; Brooke v. Ganod, 27 L. J. Ch., 226; Estes v. Furlong, 59 Ill., 298.

Vendor's delay in giving deed.] A vendor failed to make title for an unrea-

§ **1078**. In the oldest case of The Marquis of Hertford v. Boore,(*d*) a delay of fourteen months was not considered a bar to the plaintiff's bill. But in the comparatively recent case of Eads v. Williams,(*e*) where the contract was for the lease of a coal mine, a delay of three and a half years was considered fatal: in Southcomb v. The Bishop of Exeter,(*f*) a delay from the 17th of January, 1842, to the 30th of August, 1843, was held to have the same effect: and in Lord James Stuart v. The London and North-western Railway Co.,(*g*) Knight Bruce, L. J., seemed to think that a delay from October, 1848, to July, 1850, must be fatal to such a bill.[1]

§ **1079**. Where one party to the contract has given notice to the other that he will not perform it, acquiescense in this by the other party, by a comparatively brief delay in

(*d*) 5 Ves., 719.
(*e*) 4 De G. M. & G., 674; cf. supra, § 1052.
(*f*) 6 Ha., 213.
(*g*) 1 De G. M. & G., 721; and see also Spurrier v. Hancock, 4 Ves., 667; Harrington v. Wheeler, 4 Ves., 686; Guest v. Homfray, 5 Ves., 818; Thomas v. Blackman, 1 Coll., 301, 313; Sharp v. Wright, 28 Beav., 150; Moore v. Marrable, L. R. 1 Ch. 217.

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sonable time, and not until an action had been commenced to recover back the purchase money paid. Held, that where no material change of circumstances was shown, such vendee was not entitled to relief. Anderson v. Fry, 18 Ill., 94; Pratt v. Carroll, 8 Cranch, 471; Cadwalader's App., 57 Pa. St., 153; Taylor v. Porter, 1 Dana, 421; Watts v. Woddle, 6 Pet., 389; Harris v. Kidwell, 7 J. J. Marsh., 382.

Unreasonable delay.] The court will not decree specific performance of a contract in favor of a party who has unreasonably delayed the fulfillment of his part of the contract. Jones v. Jones, 11 Phila. (Pa.), 559.

[1] In Strickland v. Fowler, 1 Dev. & Bat.'s Ch., 629, a delay of nine years, unexplained, was held a bar to a suit for specific performance of a contract for the delivery of slaves. In Randolph v. Ware, 3 Cranch, 503, a delay of thirty years was held to be fatal. In Atkinson v. Robinson, 9 Leigh, 393, twenty-seven years was thought, when spent in sleeping on their rights, sufficient to preclude relief. In Barett v. Emerson, 6 Monr., 607, twenty years' delay was held to constitute laches. In Caruthers v. Trustees of Lexington, 12 Leigh, 610, a lottery was authorized in 1802, and the funds realized were expended by 1809, most of them passing through the hands of the treasurer, who died in 1817. In 1830 a bill was filed by parties interested, against the representatives of the treasurer, for an account, and the court refused to entertain the bill, on the ground that it was a stale claim. And in McMillin v. Millin, 7 Monr., 560, a lapse of five years was held to bar a bill in equity for the specific performance of a parol contract for the sale of land, of which the plaintiff had not held possession. But in Osborne v. Bremar, 1 Dessau., 486, a delay of three years in making title, by a vendor of land, was held to be no answer by him for specific performance of the contract of sale. In Burrows v. McWhann, 1 Dessau., 409, a surety, six years after the death of his co-surety, paid the debt, and, nearly two years afterwards, demanded contribution of the administrator of his co-surity. Held, that the claim was not barred by lapse of time, the administrator having made no payments in the mean time except to himself. In Kinna v. Smith, 2 Green's Ch., 14, the lapse of twelve years, without payment of interest, was not thought to make a stale demand. In Glenn v. Hebb, 12 Gill. & J., 271, where, in 1821, one partner was intrusted with the winding up of the partner-

enforcing his right, will be a bar: so that in one case(*h*) two years' delay in filing a bill after such notice, in another case(*i*) one year's, and in a third(*j*) (where the contract was for a lease of collieries) five months' like delay were held to exclude the intervention of the court.

4. *Where time does not run.*

§ **1080**. Where the contract is substantially executed, and the plaintiff is in possession of the property, and has got the equitable estate, so that the object of his action is only to clothe himself with the legal estate, time either will not run at all as laches to debar the plaintiff from his right, or it will be looked at less narrowly by the court;(*k*) for the plaintiff has not been sleeping on his rights, but relying on his equitable title, without thinking it necessary to have his legal right protected.(*l*).

§ **1081**. Therefore, where a tenant holds under a contract for a lease, pays his rent, and has possession of the property and the enjoyment of all the benefits given him by the contract, the efluxion of time will not be a ground for resisting its enforcement:(*m*) and so, where there was a contract for the lease of a shop and the sale of the stock, and the stock had been paid for, the plaintiff had been put into possession as lessee, and the rent had been paid,—in fact, everything had been done but the execution of the lease, which the defendant had refused to execute on a ground which was untenable,—specific performance of the lease was granted, notwithstanding considerable laches on

(*h*) Heaphy v. Hill, 2 S. & S., 29.
(*i*) Watson v. Reid, 1 R. & My., 236. See, also, per Lord Romilly, M. R., in Parkin v. Thorold, 16 Beav., 73, and Lehmann v. McArthur, L. R. 3 Ch., 496.
(*j*) Huxham v. Llewellyn, 21 W. R., 570, 766. See too Glasbrook v. Richardson, 23 W. L., 51 (delay of 3 months and 13 days).
(*k*) Per Lord Rosendale in Crofton v. Ormsby, 2 Sch. & Lef., 604.
(*l*) See Cartan v. Bury, 10 Ir. Ch. R., 395; Homan v. Skelton, 11 Ir. Ch. R., 96.
(*m*) Clarke v. Moore, 1 Jon. & L., 723; Sharp v. Milligan, 22 Beav., 606 (affirmed by the L. J. J.); Shepheard v. Walker, L. R. 20 Eq., 659.

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ship concerns, at an annual salary, and in 1825 the other partner died, but administration was not taken out until 1832, and the administrator filed a bill for an account against the surviving partner in 1837, it was held that the right to an account was not barred by lapse of time. In Maryland, the lapse of twenty-seven years is no bar to a bill for the specific performance of a contract. Haffner v. Dickson, 2 Har. & J., 46. And in South Carolina, it would seem that the court of chancery had established the rule that it will not interfere, unless under very special circumstances, to interpose lapse of time as a bar to a claim, unless excluded by the statute of limitations. Gist v. Cattell, 2 Dessau., 53.

the part of the plaintiff subsequent to the defendant's refusal, but therefore without costs.(*n*)[1]

§ **1082**. But possession, to save a purchaser from the usual consequence of delay, must be possession under the contract sought to be enforced, and the vendor must have known or have been bound to know that the purchaser claimed to be in posession under the contract. Accordingly in a case where the tenant of a tavern, with an option of purchasing it during his term, duly gave notice that he elected to purchase, but after some correspondence allowed the subject to drop, and then for upwards of five years remained in possession without ever insisting on the effectuation of the purchase, and from time to time making payments to the lessor's mortgagee for most of which he took receipts expressing them to be for rent, it was held by the Court of Appeal that his possession had not been such as to prevent his delay being fatal to his claim for specific performance.(*o*)

§ **1083**. Nor will time run as laches pending a negotia-

(*n*) Burke v. Smyth, 3 Jon. & L., 193. See, also, per Lord St. Leonards in Ridgway v. Wharton, 6 H. L. C., 292; and consider Brophy v. Connolly, 7 Ir. Ch. R., 177; Finucane v. Turner, 13 Ir. Ch. R., 488, 494.

(*o*) Mills v. Haywood, 6 Ch. D., 196.

[1] It seems to be well established, in this country, that lapse of time is no objection to a specific performance of a contract to convey land, where the person originally entitled to the conveyance, and those claiming under him, have been in uninterrupted possession of the land. Miller v. Bear, 3 Paige, 466; Longworth v. Taylor, 1 McLean, 395, is a case of this nature. There A. purchased a lot of land from B., paying one-third of the price and taking possession. B. agreed to give a deed in three months, and A. to give a mortgage to secure the balance of the price, which was payable in six and twelve months. B. did not make a deed, nor did A. pay the second installment, but payment was suspended on an agreement that interest should be paid instead. A. erected buildings on the lot, but on learning that the title was contested, he withheld any further payments in 1810. B. recovered possession in 1822, in an action of ejectment. In 1825, A. filed a bill for specific performance. Held, that the parties might be considered as mortgagor and mortgagee, as the defendant's default had prevented them from occupying that position in law; that the plaintiff's equity was not extinguished by lapse of time, and that he had not been guilty of such negligence as to cut off his right to a decree for performance. So, in Waters v. Travis, 9 John., 450, where, by a contract for the sale of land, the vendor was to convey at a time specified, and the vendee was, "at the same time," to secure the purchase money, and the vendee took possession under the contract, but no conveyance was executed, and the purchase money was not paid for fifteen years, it was held that the lapse of time was no objection to a decree for specific performance at the suit of the vendee. And again, where A., the owner of a survey in 1774, agreed to convey a portion thereof to B., who took, and held, possession of such portion until 1822, when A. never having assigned his right to such land to B., nor himself obtained a grant, and having died, his devisee obtained a grant of the whole survey, it was held that the lapse of time was not a bar to a bill by B. against the devisee for a specific performance of A.'s contract. Williams v. Lewis, 5 Leigh, 686.

tion between the parties to the contract, even though it may be carried on without prejudice to a notice given by one party that he holds the contract rescinded.(*p*) But where the negotiation is about a point which is not the real cause of the delay, its pendency will not prevent the effluxion of time operating as laches: so where there were two purchases, and disputes arose about the title and a valuation incident to the purchase, but from the evidence it appeared that want of means in the purchaser who had instituted the suit, and not these disputes, was the real cause of delay, Knight Bruce, V. C., though after some hesitation, refused specific performance, as the plaintiff in such suits must have more that a doubtful title.(*q*)

§ **1084**. When the delay arises from an untenable objection taken by one party, that party cannot avail himself of the delay caused by it, as a ground for the non-performance of the contract.(*r*) And generally, whenever the delay is attributable to the defendant, he will not be allowed to avail himself of it as a defense.(*s*)

§ **1085**. In Lamare v. Dixon(*t*) an intending lessee, relying on a verbal promise by the owner of some wine vaults that they should be made dry, signed a written contract to accept a lease of the vaults at a specified rent, and went into possession. The vaults not being made dry, the tenant constantly complained, and, though he paid rent, always paid it under protest; until, finally, after having actually occupied the vaults for upwards of two years, he refused to take the lease on the ground that the owner's promise had never been fulfilled. The House of Lords held that the tenant's payments were referable merely to his actual use and occupation of the premises, that such payments and possession did not amount to such acquiescence as to debar the tenant from defending his refusal on the ground of the non-performance of the promise which had been the inducement to the contract, and that the owner's delay and conduct in the matter generally disentitled him to insist on specific performance of the contract; but the house con-

(*p*) Southcomb v. Bishop of Exeter, 6 Ha., 213; McMurray v. Spicer, L. R. 5 Eq., 527; and cf. Lehman v. McArthur, L. R. 3 Ch., 504.

(*q*) Gee v. Pearse, 2 De G. & S., 325.

(*r*) Monro v. Taylor, 3 Mac. & G. 713, 723.

(*s*) Morse v. Merest, 6 Mad., 26; Shrewsbury and Birmingham Railway Co. v. London and North-Western Railway Co., 2 Mac & G. 324, 355; per Lord St. Leonards in Ridgway v. Wharton, 6 H. L. C., 292.

(*t*) L. R. 6 H. L., 414.

sidered the delay which had occurred so chargeable to both parties that the bill, though dismissed, was dismissed without costs.

§ **1086**. The fact that the purchaser has allowed the deposit to remain in the hands of the vendor from the time when the former rescinded the contract until the filing of the bill has been decided not to affect the question of laches.(*u*)

§ **1087**. So also continuing in possession, if under an arrangement to that effect, will not affect the question.(*v*)

§ **1088**. In a case already referred to Lord Romilly, M. R., expressed the opinion that time does not run as laches in the case of land taken under a railway act, until the time during which the company had the power to make the railway ceased, as the fact whether the company would require the land or not could not be ascertained until that time :(*w*) but this view was not adopted by Knight Bruce and Lord Cranworth, L. J. J., who seem to have thought that time would run from the date of the contract.

§ **1089**. It is to be observed that a mere claim or protest by words or letters, though continual, unaccompanied by any act to give effect to them, will not prevent time operating as laches against the party making the claim, nor keep alive a right which would otherwise be precluded.(*x*)

5. *Waiver of delay.*

§ **1090**. Objections grounded on lapse of time are waived by a course of conduct inconsistent with the intention of insisting on such an objection: and in this respect it is immaterial whether time were originally of the essence or subsequently engrafted on the contract.(*y*)[1]

§ **1091**. Therefore, where a title is in a state which may cause delay, or a good title has not been completely shown by the day for completion, and the purchaser goes on dealing about the title after that day, this will waive his right

(*u*) Watson v. Reid, 1 R. & My., 236; Southcomb v. Bishop of Exeter, 6 Ha., 213, 224.

(*v*) Southcomb v. Bishop of Exeter, ubi supra.

(*w*) Lord James Stewart v London and North-Western Railway Co., 15 Beav., 513; S. C. 1 De G. M. & G., 721.

(*x*) Clegg v. Edmondson, 8 De G. M. & G., 787, 810; Lehmann v. McArthur, L. R. 3 Ch., 496, 504.

(*y*) King v. Wilson, 6 Beav., 124.

[1] Specific performance will be decreed against a party, who, by his acts, has waived the materiality of time. Reetor v. Price, 1 Mis., 373.

to insist on the time.(*z*) So the examination of the abstract after the time will prevent a defendant insisting on time as essential, for he had no right to look into the abstract if he meant to abandon his purchase.(*a*) And such conduct will amount to a waiver, even though a formal notice to abandon the contract may have been given.(*b*) So again, insisting on the contract after the time limited for completion is an act waiving the right to insist on that time as essential.(*c*) But where a purchaser protests against delay, and then under protest deals about the title, this will not, it seems, amount to a waiver.(*d*)

§ **1092**. As a general principle, a stipulation as to time cannot be bindingly waived otherwise than by an intentional act, done with knowledge of all material circumstances. Accordingly, in a case already cited, where a railway company agreed to do certain works to be directed by the award of a surveyor, to be made within a specified time, and the award was not made within that time, the company were held not to have waived the condition as to time by having, in ignorance of the fact that the award was made late, taken it up and paid the surveyor's charges for it.(*e*)

§ **1093**. Again, as to time for payment: where an assignor of a lease insisted on a forfeiture of the assignment by reason of non-payment of part of the purchase money at the time stipulated, he was held to have waived it by getting the assignee to pay the rent to the superior landlord, that not being consistent with the notion that the agreement was at an end.(*f*) In another case there was a contract that if the residue of the purchase money was not paid at a certain day, the contract should be void: it was not paid, but the vendor, allowing the purchaser to retain possession and taking from him a warrant of attorney to confess judgment in ejectment, was held to have waived the condition.(*g*)

§ **1094**. As to the time for the delivery of objections, a subsequent corsespondence as to title was in one case held to work a waiver:(*h*) and a similar result was in another

(*z*) Pincke v. Curtis, 4 Bro. C. C., 329.
(*a*) Seton v. Slade, 7 Ves., 265
(*b*) Hipwell v. Knight, 1 Y. & C. Ex , 401.
(*c*) Pegg v. Wisden, 16 Beav., 239.
(*d*) Magennis v. Fallon, 2 Moll., 561, 576. But see St. Leon. Vend , 291.
(*e*) Earl of Darnley v. London, Chatham and Dover Railway, 1 De G. J. & S., 204, 3 id 24, L. R 2 H. L., 43.
(*f*) Hudson v. Bartram, 3 Mad., 440; Webb v. Hughes, L. R. 10 Eq , 281.
(*g*) Ex parte Gardner, 4 Y. & C. Ex., 503.
(*h*) Cutts v. Thodey, 13 Sim., 206.

case held to follow from the subsequent renewal of negotiation as to price.(*i*)[1]

§ **1095**. So, again, taking possession after the default as to time may, it seems, preclude the objection :(*j*) but merely giving possession before the day for payment has arrived is no waiver of a vendor's right to insist upon payment on that day.(*k*)

§ **1096**. The mere extension or giving of time, where time is of the essence of the contract, is only a waiver to the extent of substituting the extended time for the original time, and not an utter destruction of the essentiality of the time. And so where, by the terms of a contract for the sale of the benefit of a building contract, a moiety of the price was to be paid on a specified day, and the vendors afterwards by letter gave the purchaser until a later (named) day to make the payment, but the money was not paid by that day, Jessel, M. R., held that time was originally of the essence of the contract, and the letter only a qualified and conditional waiver of the original stipulation ; and that, consequently, the vendors were entitled to treat the contract as at an end.(*l*)

§ **1097**. It is perhaps scarcely needful to remark, that a waiver as to the time in which an act is to be done, is not necessarily in any degree a waiver of the act itself. So that where it was agreed that A. should repair some warehouses by the first of April, and that B. should then take a lease of them, and the repairs were not done by the day appointed, but B. continued to deal in a way which was held to amount to a waiver of the time as essential (if by the contract it had ever been so), and afterwards and before a lease was executed the warehouses were burned down : it was held that B., though he had waived the essentiality of time, had not

(*i*) Eads v. Williams, 4 De G. M. & G., 674.
(*j*) Boehm v. Wood, 1 J. & W., 420.
(*k*) See Barclay v. Messenger, 22 W. R., 523.
(*l*) Barclay v. Messenger, 22 W. R., 522; 43 L. J. Ch., 449. In this case Jessel, M. R., distinctly dissented from the view expressed by Lord Romilly, M. R., in Parkin v. Thorold (16 Beav., 59), as to the effect of a letter extending the time for completion.

[1] *What will relieve the vendor of the necessity of executing a deed.*] The vendor need not execute and tender a deed where the vendee positively refuses to receive it at the time and place agreed upon. It is the same where the vendee abandons the possession and refuses to take the property. Maxwell v. Pettinger, 3 N. J. Eq., 156; Crary v. Smith, 2 N. Y , 60. The vendee need not tender the purchase price where the vendor notifies him that he will not fulfill. White v. Dobson, 17 Gratt , 262; Brown v. Eaton, 21 Minn., 409; Mattocks v. Young, 66 Mo., 459.

waived the condition that the repairs should be effected prior to his taking a lease, and consequently, that the proposed lessor A., and not the proposed lessee B., must bear the loss.(*m*)

§ **1098**. The question whether time was originally of the essence, and whether it has since been waived, is one of evidence, and can therefore be disposed of only at the trial.(*n*)[1]

(*m*) Counter v. Macpherson, 5 Moo. P. C C., 83; and See Hughes v. Jones, 3 De G. F. & J., 307.

(*n*) Levy v. Lindo, 3 Mer., 81.

[1] *Extension of time.*] Where delay has been by common consent, and particularly where it has occasioned no injury, equity will not refuse specific performrnce. Leaird v. Smith, 44 N. Y., 618; Hull v. Sturtevant, 46 Me., 34; Bass v. Gilliland, 5 Ala., 76; Schroeppel v. Hopper, 40 Barb., 425; King v. Ruckman, 24 N. J. Eq., 356.

Where both parties are in default.] When this is the case, of course neither can complain of non-performance. Crabtree v. Levings, 53 Ill., 526.

Default of vendee in payment of purchase money.] The vendee's failure to pay the purchase money upon a particular day, almost always admits of adequate compensation, either by the payment of interest or the imposition of a greater penalty; and where time is not made a definite part of the agreement it is not essential, and will not operate to prevent equity from decreeing specific performance. Gibbs v. Champion, 3 Ohio, 335; Magoffin v. Holt, 1 Duvall, 95; Keeler v. Fisher, 7 Ind., 718; Pinckney v. Hagedorn, 1 Duer, 89; Grouer v. Fisher, 11 Ill., 666; Hall v. Delaplaine, 5 Wis., 206; Andrews v. Sullivan, 7 Ill., 327; Crittenden v. Drury, 4 Wis., 205; Reed v. Jones, 8 id., 392; Armstrong v. Pierson, 5 Iowa, 317; De Arras v. Keyser, 26 Pa. St., 249; Converse v. Blumrich, 14 Mich., 109; Bromier v. Cauldwell, 8 id., 465; Primm v. Barton, 18 Tex., 200; De Camp v. Crane, 19 N. J. Eq., 166; Shaffer v. Niner, 9 Mich., 253; Shouman v. Harford, 55 Me., 197.

Example of due diligence in attempting to pay purchase money.] Hubble v. Van Schoening, 49 N. Y., 326; reversing S. C., 58 Barb., 498, is an instructive case, as explaining what is deemed due diligence in an attempt to tender the purchase money.

Delay constituting a "stale equity."] There is no certain rule as to what will constitute a "stale equity;" each case must be decided upon its surrounding circumstances, what has been paid, and any reasonable excuse for delay. Paschell v. Hinderer, 28 Ohio St., 568; Rayner v. Pearsall, 3 John.'s Ch., 578; Atwater v. Fowler, 1 Edw., 417. A delay of fourteen months was excused. Marquis of Hertford v. Boore, 5 Ves., 719; Glover v. Fisher, 11 Ill., 666. Valuable improvements were made upon land conveyed, and several years were permitted to elapse before an action was brought. Held, that the mere delay was not fatal. Laverty v. Hall, 19 Iowa, 526. Delay, for the following time, was held to be fatal: One year, seven months and thirteen days, Southcomb v. Bishop of Exeter, 6 Hare, 213; one year and nine months, Lord James Stuart v. London and Northwestern R. R. Co., 1 De G. M. & G., 721; three years and a half, Eads v. Williams, 4 id., 674. The parties differed as to the construction of the agreemement. Held, that a delay of seven years was fatal. Milward v. Earl of Thanet, 5 Ves., 720.

Waiver.] A party cannot insist on a forfeiture, in a case where he has waived a condition, or treated the contract after default, as continuing in force. Sharp v. Trimmer, 24 N. J. Eq., 422; Morgan v. Herrick, 21 Ill., 481; Ewins v. Gordon, 49 N. H., 460. Where valuable improvements have been made after default, see Bellamy v. Ragsdale, 14 B. Mon., 364. A tender having been refused on the ground that it was not made in time—held, that the objection could not afterwards be taken that the tender was not made in money. Duffy

v. O'Donavan, 46 N. Y., 223; see, also, Laverty v. Moore, 33 id., 658; Cunningham v. Brown, 44 Wis., 72; Hedenburgh v. Jones, 73 Ill , 149; Hoyt v. Texbury, 70 id., 331; Ditton v. Harding, 73 id., 117; De Wolf v. Pratt, 42 id , 198. The vendor agreed to execute a deed when demanded, and did not make the collection of paper, assigned in payment, a condition precedent to the conveyance of title. Held, that he took the risk of collection, and that the contract would be specifically enforced. Smoot v. Rea, 19 Md., 398. Where either party shows by his acts that he has waived or abandoned the contract, and particularly where circumstances justify the belief that he intended to perform only in case it suited his interest, in such a case he forfeits all claim to equitable relief. Eastman v. Plumer, 46 N. H., 464.

No time fixed for payment, and making title.] Where real property is sold, and there is no time fixed either for the payment or delivery of the deed, the payment must be made upon request, or within a reasonable time. Andrews v. Bell, 56 Pa. St., 343.

Abandonment of the contract by vendee.] Any action on the part of the vendee which clearly indicates an abandonment of the contract on his part, will deprive him of the right to demand the interposition of a court of equity. Finch v. Parker, 49 N. Y., 1; Fuller v. Hovey, 2 Allen, 324; Sprigg v. Albin, 6 J. J. Marsh., 158; Brackin v. Martin, 3 Yerg., 55; Mann v. Dunn, 2 Ohio St., 187; Effinger v. McGreal, 31 Tex., 147; Rose v. Swann, 56 Ill , 371; Bremer v. Connecticut, 9 Ohio, 189; Howe v. Rogers, 32 Tex , 218; Bennett v. Welch, 25 Ind., 140; Campbell v. Hicks, 19 Ohio St., 4 3; Gentry v. Rogers, 40 Ala., 442; Weber v. Marshall, 19 Cal., 447; Scott v Barker, 14 Ohio, 547; Broaddus v. Ward, 8 Mo., 217; Patterson v. Martz, 8 Watts. 373; Thompson v. Bruen, 46 Ill., 125; Green v. Covilland, 10 Cal., 317; Peck v. Brighton, 69 Ill., 200; Mix v. Bulduc, 78 id., 215.

Gross laches; vendor may resell.] Where the vendee of real property has been guilty of gross laches, the vendor will be justified in reselling the property; this he may do, without first making a tender of the money already paid him. Mason v. Owens, 56 Ill., 259; see, also, Williams v. Starke, 2 B. Monr., 196; Hawthorn v. Bronson, 16 Serg. & Rawle, 269; Gariss v. Gariss, 2 N. J. Eq., 79.

Failure to enforce his rights of action.] A party must not sleep on his rights. Where a party has rights under a contract, it will be a good defense to his action, when finally brought, that he suffered an unreasonably long time to elapse without attempting to enforce such rights. This is true, unless there is some special equity which requires a specific performance. Van Doren v. Robinson, 16 N. J. Eq., 256; Preston v. Preston. 5 Otto, 260; Keller v. Lewis, 53 Cal., 113; McLaurie v. Barnes. 72 Ill., 73. An agreement was made to execute a mortgage. Held, that a delay of eight years before commencement of the action, was fatal. Nelson v. Hagerstown Bank, 27 Md., 51. A party paid no taxes, exercised no ownership over an estate, and asserted no rights under a contract for eleven years, and allowed a subsequent purchaser, without notice, to improve the property. Held, that the delay was such as to bar all claim for relief at equity. Inglehart v. Vail, 73 Ill., 63; see, also, Conway v. Kinsworthy, 21 Ark., 9; Fitch v. Boyd, 55 Ill., 307; Dubois v. Baum, 46 Pa. St., 537; King v. Hamilton, 4 Pet., 311. A vendee paid the purchase money, and then slept on his rights for sixteen years, before bringing his action for specific performance. Held, that the contract could not be enforced, in the absence of any strong equities. Johnson v Hopkins, 19 Iowa, 172 A decree was refused where the delay was for seventeen years. Peters v. Delaplaine, 49 N Y., 362. And where the delay was eighteen years. Watson v. Inman, 23 Tex , 531.

PART IV.

OF THE MODE OF EXERCISING THE JURISDICTION.

CHAPTER I.

OF THE INSTITUTION OF THE PROCEEDINGS.

§ **1099**. At the time when the judicature act, 1873, came into operation, the usual mode of proceeding in order to obtain the specific performance of a contract was to institute a suit for the purpose by bill of complaint in Court of Chancery.

§ **1100**. By the 34th section of the judicature act, 1873, all causes and matters for the specific performance of contracts between vendors and purchasers of real estates, including contracts for leases, are specially assigned (subject to the rules of the Supreme Court[*a*]), to the chancery division of the high court of justice.

§ **1101**. Causes or matters for the specific performance of other contracts are not expressly assigned to any particular division of the high court, and may accordingly, it would seem, be instituted, at the plaintiff's option, in any division, subject to the powers of transfer exercisable under the judicature acts and the rules of court.(*b*)

§ **1102**. A form of endorsement for the writ in an action for the specific performance of a contract for the sale of land is given in Appendix A. (Part II. § i. 9), to the first schedule to the judicature act, 1875.

§ **1103**. It is provided by the acts and rules (*c*) that any action may be transferred from one division of the court to another. Accordingly, where, in an action for the recovery of land commenced in the exchequer division the defendant set up a counterclaim for specific performance of a contract for a lease of the land to himself, and it appeared that there

(*a*) See Ord. L. I.
(*b*) See Jud. Act, 1873, s. 33; Jud. Act, 1875, s. 11; Ord. L. I.
(*c*) Jud. Act, 1873, s. 36; Jud. Act, 1875, s. 11; Ord. L. I. rr., 1, 2.

was a *primâ facie* case for specific performance, the action was transferred, on the defendant's application and against the plaintiff's will, to the chancery division.(*d*) And a similar order was affirmed by the Court of Appeal in the case of Holloway v. York,(*e*) where, the liquidation-trustee of a person who had contracted to purchase real estate having commenced an action in the exchequer division against the vendor for a return of the deposit, the vendor had delivered a counterclaim for specific performance of the contract.

§ **1104**. But a defendant sued in the Queen's Bench division of the court does not become entitled to have the action transferred to the chancery division merely by putting in a counterclaim for the specific performance of some contract relating to land between himself and the plaintiff.(*f*) The court will, however, take notice of an equitable right to specific performance appearing incidentally in the course of an ejectment action, though there be no counterclaim for such performance.(*g*)

§ **1105**. The determination by the court of questions of law between vendors and purchasers of real or leasehold estate, and judicial declarations as to their respective rights under the contract of sale, may, it is conceived, be obtained upon a special case stated in the action.(*h*) The court of chancery could not enforce specific performance in a proceeding of this nature;(*i*) but under the present practice, where the answers to the special case dispose of the action, they may be turned into a judgment making declarations to the same effect.(*j*)

§ **1106**. A convenient mode of obtaining an authoritative decision of questions arising upon some of the class of contracts discussed in this treatise has been introduced by the vendor and purchaser act, 1874, under which (section 9) a vendor or purchaser of real or leasehold estate or their respective representatives may at any time apply in a summary way to a judge of the high court in chambers in respect of any requisitions or objections or any claim for compen-

(*d*) Hillman v. Mayhew, 1 Ex D., 132.
(*e*) 2 Ex D., 333.
(*f*) Storey v. Waddle, 4 Q. B. D., 289.
(*g*) Williams v. Snowden, W. N., 1880, 124 (C. P. Div.)
(*h*) Compare Sabin v. Heape, 27 Beav., 553, 561 (where the decision was tantamount to a decree for specific performance), and Ord., XXXIV.
(*i*) See Evans v. Saunders, 22 L. T., 43, 51. The procedure by special case under Sir George Turner's act (13 & 14 Vict., c. 35,) is now abolished (Ord., XXXIV. r. 7).
(*j*) Harrison v. Cornwall Minerals Railway Co., 16 Ch. D., 67, 80.

sation or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract), and the judge is to make such order upon the application as to him shall appear just, and to order how and by whom all or any of the costs of and incident to the application are to be borne and paid. In very many of the disputes that arise between vendors and purchasers of realty and leaseholds an application under this section is an advantageous and efficient substitute for an action for specific performance.(*k*) The parties to such an application are in the same position as they would be under a reference as to title in such an action.(*l*)

A person who has availed himself of the provisions of the act is not entitled afterwards to bring an action for the specific performance of the contract which was the subject of the summons.(*m*)

§ **1107**. By the county courts act, 1865, section 1, all the jurisdiction of the Court of Chancery in suits for specific performance(*n*) was given to the county courts where the purchase-money did not exceed the sum of £500; and by virtue of the 6th section of the county courts act, 1867, the jurisdiction so given may now be exercised in all actions for specific performance of any contract for the sale, purchase, or lease of any property, where, in the case of a sale or purchase, the purchase money, or in the case of a lease the value of the property, does not exceed £500. Apparently, however, the jurisdiction under these enactments is confined to cases where the consideration for the sale is a sum certain.

§ **1108**. Directions are given in the county courts acts of 1865 and 1867 (28 and 29 Vict. c. 99, 10; 30 and 31 Vict. c. 145, s. 1) as to the particular county court to be selected, in any particular case, for an action for specific performance; and the details of the practice and procedure in all county court actions are regulated by the county court rules, 1875 and 1876. Every county court has, in dealing with actions within its jurisdiction, all the powers of the high court of

(*k*) For cases under this section see Re Waddell's contract, 2 Ch. D., 172; Re Coleman and Jarrom, 4 Ch. D., 165 (where, to strengthen the purchaser's title, Jessel, M. R., delivered judgment in court; Re Popple and Barratt's contract, 25 W. R., 48; Re Kearley and Clayton's contract, 7 Ch D., 615; Re Metropolitan District Railway Co. & Cosh, 13 Ch. D., 607; Osborne to Rowlett, 13 Ch. D., 774; Drapers Co. v. McCann, 1 L. R Ir., 13 (summons may be served out of the jurisdiction).

(*l*) In Re Burroughs, Lynn and Sexton, 5 Ch D., 601.

(*m*) Thompson v. Ringor, 29 W. R. 520.

(*n*) See Wilcox v. Marshall, L. R. 3 Eq., 270 (contract for lease).

justice (judicature act, 1873, s. 89); and, in a proper case, any action may be transferred either from a county court to the high court, or *vice versâ*, or from one county court to another.(*o*) An appeal lies from the decision of a county court judge in an action for specific performance to a divisional court of the high court; but, except by special leave, there is no further appeal.(*p*)

§ **1109**. The jurisdiction of the high court in cases of specific performance has not been ousted by that conferred by county courts. Though the matter may be within the jurisdiction of the inferior court, a plaintiff is at liberty to bring his action in the high court (subject, of course, to the statutory provisions as to transfer already referred to), and is entitled, if successful, to the usual costs of a suitor there.(*q*)[1]

§ **1110**. It may here be mentioned that by the land transfer act, 1875, it has been enacted that (s. 93) where a suit is instituted for the specific performance of a contract relating to registered land, or a registered charge, the court having cognizance of such suit may by summons, or by such other mode as it deems expedient, cause all or any parties who have registered estates or rights in such land or charge, or have entered up notices, cautions, or inhibitions against the same, to appear in such suit, and show cause why such contract should not be specifically performed, and the court may direct that any order made by the court in such suit shall be binding on such parties or any of them. Further, by the 94th section of the same act, all costs incurred by any party so appearing in a suit to enforce against a vendor

(*o*) 28 & 29 Vict. c. 99, ss. 3, 8, 9, 11; 30 & 31 Vict. c 142, s. 5; Jud. Act, 1873, s 90.
(*p*) 28 & 29 Vict. c. 99, ss. 18, 19; Jud. Act, 1873, s. 45.
(*q*) Scotto v. Heritage, L. R. 3 Eq., 212; Brown v. Rye, L. R. 17 Eq., 343; Carpmael v. Carvell, 18 W. R., 513.

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[1] *Concurrent jurisdiction.*] Equity will not assist where the remedy at law has been barred by the statute, in cases of concurrent jurisdiction. Blanchard v. Williamson, 70 Ill., 647.

Statute a bar in New York after ten years.] "The provisions of the Code requiring a written acknowledgment to take a case out of the statute of limitations has effectually destroyed the old doctrine on which courts of equity relieved vendees from forfeitures incurred in consequence of their failure to perform executory contracts for the sale of lands. That doctrine rested on the principle that time was not of the essence of the contract; but now the statute has interposed an absolute bar after the lapse of ten years." Gilbert, J., in McCotter v. Lawrence, 4 Hun, 107.

specific performance of his contract to sell registered land or a registered charge are to be taxed as between solicitor and client, and, unless the court otherwise orders, paid by such vendor.(*r*)

§ **1111**. How far the summary jurisdiction conferred by the 35th section of the companies act, 1862, is properly applicable to the enforcement of contracts for the sale and purchase of shares is a question which has been much discussed, but can hardly be said to be even now satisfactorily settled. That section provides that if the name of any person is without sufficient cause entered in or omitted from the register of members of a company under the act, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved may apply by motion or summons for an order of the court that the register may be rectified, "and the court may either refuse such application, with or without costs to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application, or petition, and any damages the party agrieved may have sustained. The court may, in any proceeding under this section, decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the register, whether such question arises between two or more members or alleged members or between any members or alleged members and the company, and generally the court may in any such proceeding decide any question that it be necessary or expedient to decide for the rectification of the register."

§ **1112**. The enactment may seem at first sight to offer an attractive and efficient substitute for an action for specific performance in cases arising out of contracts for the sale of shares, but the decisions upon it show that its applicability in practice to such cases is by no means universal. The jurisdiction which it confers is clearly discretionary; and, whatever the effect of the limited power which it gives the

(*r*) See too as to bringing in third parties, Ord, XVI. rr. 17, 19, 21; supra, § 168 et seq. and § 877.

court over costs upon the generality of its subsequent language,(*s*) it seems that the court will at any rate be slow to exercise this jurisdiction for the purpose of deciding questions between vendors and purchasers of shares, except where the legal title of the applicant is clear.(*t*)

(*s*) See per Jessel, M. R., in Ex parte Sargent, L. R. 17 Eq., 276.

(*t*) Ward and Henry's case, L R. 2 Eq., 226; 2 Ch., 431; Musgrave and Hart's case, L. R. 5 Eq., 193; Ex parte Sargent, L. R , 17 Eq., 273; Ex parte Shaw, 2 Q. B. D , 463. See too Buckley, Comp Acts (3d ed.), 81-84.

CHAPTER II.

OF INJUNCTIONS.

§ **1113**. It has already been in effect stated(*a*) that executed, as distinguished from executory, contracts are not within the scope of this treatise. The present chapter will accordingly be confined to the consideration of the use of injunctions in connection with contracts of the latter kind.

§ **1114**. The jurisdiction of the court in injunction is connected with the specific performance of executory contracts in three ways:[1]—

(1) Sometimes the injunction is the instrument by which the court specifically enforces the contract itself or some part of it;

(2) Sometimes the injunction is merely incident or ancillary to the performance of the contract; and

(3) Sometimes the injunction is used for the purpose of giving effect to rights resulting from the non-performance of the contract.

1. *Injunction the instrument of performance.*

§ **1115**. It is evident that whenever the court grants an injunction restraining the breach of any express or implied

(*a*) Supra, § 21; cf. §§ 180, 1540.

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[1] *Injunction; where the law would work injustice.*] In a case when, by fraud or mistake, a party has an advantage in proceeding at law, and which will manifestly make the law a sword of injustice, a court of equity will restrain the party where conscience is thus barred from using the advantage he has improperly gained. In such a case it was said, *per curium:* "The only ground upon which this testimony can be received to control the legal effect and operation of these covenants is the fraud of the party in attempting to enforce them in violation of his agreement. The evidence is regarded as sufficiently certain and clear, in the proof of that contract, that the damages to be paid by the railroad for their right in the premises were to be divided between these parties in specific proportions, and that no claim was to be made on the grantor on his covenant in this deed for any matter arising out of that negotiation; and evidently it was in confident reliance upon this understanding that the grantor neglected so to qualify his covenant that no right of action could arise thereon for that matter. Regarding these facts, therefore, as sufficiently proved, and the bill as sufficiently setting up the fraud and asking for relief on that ground, we think the case is brought within the general rule upon which relief is granted." Taylor v. Gilman, 25 Vt., 411.

term of a contract it thereby *pro tanto* specifically enforces the performance of the contract.(*b*)

§ **1116**. Where the contract contains express negative as well as positive terms, and the positive terms are capable of specific performance by the court, the court may and naturally will enforce by injunction the observance of the negative terms; for by so doing it promotes the complete performance of the contract as a whole.

§ **1117**. Thus where the commissioners of woods and forests contracted with a committee of the united service club for the grant by the commissioners to the trustees of the club of a lease of a specified piece of ground, and further that a specified plot on the south side of this piece of ground should be laid out as an ornamental garden, and no buildings whatever should be erected thereon, and afterwards the commissioners began to build stables on the plot; the court specifically enforced the observance of the negative stipulation by restraining the commissioners from continuing to build on the plot and also from permitting such part of the stables as had already been built to remain upon it.(*c*)

§ **1118**. But where part of the contract is of such nature as to be incapable of specific performance by the court, a difficulty presents itself with respect to the court's enforcement of any other part of it by injunction.

For, as we have seen.(*d*) the court will not, as a general rule, enforce part of an executory contract unless it can perform the whole; and, in the case supposed, the grant of an injunction would obviously be tantamount to a merely partial enforcement of the contract.

§ **1119**. On the principle referred to in the last preceding section, one would expect to find the court always refusing to interfere by injunction to restrain the breach or non-performance of part of an executory contract where the rest of the contract is incapable of, or is not a proper subject for, specific performance: and in fact there are numerous instances of such refusal.(*e*)

(*b*) As to injunctions restraining applications to Parliament, see infra, Part VI., chap. IX., § 1567 et seq; and, as to the discretionary character of the jurisdiction, see per Lord Westbury in Low v. Innes, 4 De G. J. & S., 290.

(*c*) Rankin v. Huskissom, 4 Sim., 13 (Shadwell, V. C.).

(*d*) Part III., chap. xvi., §§ 802, 811, 833 et seq.

(*e*) See e. g., supra, § 833 et seq., and the cases there cited: also Fothergill v. Rowland, L. R. 17 Eq., 132, cited supra, § 840; per Lord Cottenham in Dietrichsen v. Cabburn, 2 Ph., 57; Rogers v. Wilmot, W. N., 1880, 88. Cf. Horne v. London and North western Railway Co., 10 W. R., 170.

§ **1120**. There are, however, cases in which, though the contract as a whole has been such as the court could not or would not specifically enforce, it has nevertheless granted an injunction restraining the breach of some express or implied term of it. These cases have already been discussed at length in a previous chapter.(*f*) It may here be added that whenever, in such cases, a person is compelled by injunction to observe some negative term of a contract, the whole benefit of the injunction is conditional upon the plaintiff's performing his part of the contract, and the moment he fails to do any of the acts which he has engaged to do, and which were the consideration for the negative term, the injunction will be liable to be dissolved.(*g*)

§ **1121**. In connection with the cases referred to in the last preceding section, the old case of Martin v. Nutkin(*h*) may be referred to. There articles were executed between the plaintiffs, who resided very near the church of Hammersmith, and the parson, church wardens, overseers, and some of the other inhabitants of the parish, by which the plaintiffs covenanted to erect a new cupola, clock and bell to the church, and the other parties covenanted that a bell which had been daily rung at five o'clock in the morning, to the great annoyance of the plaintiffs, should not be rung during the lives of the plaintiffs or the survivor of them: the plaintiffs performed their part of the contract, but the bell after about two years was rung again: the contract on the part of the parish authorities was specifically enforced against them by means of an injunction; although, as Lord St. Leonards remarked in the course of his judgment in Lumley v. Wagner,(*i*) the court clearly could not have granted any specific performance.

2. *Injunction ancillary to performance.*

§ **1122**. The jurisdiction of the court in injunction is often ancillary to that in specific performance, for the purpose of preventing the defendant making a use of some legal interest or right vested in him in a way inconsistent with

(*f*) Part III., chap. xvi., § 833 et seq.
(*g*) See per Lord Hatherley (then V. C.) in Stocker v. Wedderburn, 3 K. & J., 405.
(*h*) 2 P. Wms., 266.
(*i*) 1 De G. M. & G., 614.

the equity claimed by the plaintiff, or embarrassing the plaintiff by dealing with the property during the pendency of the action, or obstructing the performance of some act incidental to the execution of the contract. "The court will in many cases interfere and preserve property *in statu quo* during the pendency of a suit, in which the rights to it are to be decided, and *that* without expressing, and often without having the means of forming, any opinion as to such rights."(*j*)

§ 1123. In the class of cases now to be considered the injunction is therefore granted, upon interlocutory application and until the trial, on the plaintiff showing a *primâ facie* case for specific performance.(*k*) It is not necessary that it should be clear that the plaintiff will succeed at the trial: it is sufficient if there is ground for supposing that relief may be given.(*l*) For on this application the court will not decide delicate points,(*m*) such as delay, which can only be decided at the trial.(*n*)

§ 1124. Accordingly, where an intended lessor was sued by an intended lessee for the specific performance of a contract to grant a lease, he was restrained from bringing an ejectment during the suit.(*o*) In another case the plaintiff (purchaser) obtained an injunction to restrain the vendor from conveying away the legal estate, which might compel the plaintiff to make some other person a party to the suit.(*p*) In other cases injunctions to restrain sale and surrender of estates as to which specific performance was sought, were granted on certificate of bill filed and affidavit.(*q*) And in another case, an injunction was granted to restrain a purchaser, who had got into possession, from cutting timber on the estate.(*r*)[1]

(*j*) Per Lord Cottenham in Great Western Railway Co. v. Birmingham and Oxford Junction Railway Co. 2 Ph., 602; Cf. Order LII. rr. 1-3.
(*k*) Powell v. Lloyd, 1 Y. & J., 427.
(*l*) Hudson v. Bartram, 3 Mad., 440, 447; Attwood v. Barham, 2 Russ., 186.
(*m*) Price v. Assheton, 1 Y. & C. Ex., 82.
(*n*) Levy v. Lindo, 3 Mer., 81.
(*o*) Boardman v. Mostyn, 6 Ves., 467; Buckland v. Hall, 8 Ves., 92; Attwood v. Barham, 2 Russ., 186. Distinguish Fox v. Purssell, 3 Sm. & G., 242.
(*p*) Echliff v. Baldwin, 16 Ves., 267.
(*q*) Curtis v. Marquis of Buckingham, 3 V. & B., 168; Spiller v. Spiller, 3 Sw., 556.
(*r*) Crockford v. Alexander, 15 Ves., 138. Distinguish Marshall v. Watson, 25 Beav., 501, 504.

[1] *Injunction granted.*] The vendee paid the entire consideration for personal property, and, before its delivery, the vendor was about to dispose of it in fraud of vendee's rights. The vendee was insolvent, and great difficulty would have been experienced in replevying the property. Held, that the vendee was entitled to an injunction in the nature of specific performance. Parker v. Garrison, 61 Ill., 250; see, however, City, etc., Ins. Co. v. Olmstead, 33 Conn., 476.

§ **1125**. On the same principle, where the contract was for the sale of a leasehold public house at a fixed price, and of the furniture, fixtures, and other effects on the premises, at a valuation to be made by a valuer named in the contract, and the vendor refused to allow the valuer to enter upon the premises for the purpose of making an inventory of the articles to be valued, Jessel, M. R., upon the interlocutory application of the purchaser in a suit instituted by him for the specific performance of the contract, made an order compelling the vendor to allow the valuer to enter.(*s*) "I have no hesitation," said his lordship, "in saying that there is no limit to the practice of the court with regard to interlocutory applications so far as they are necessary and reasonable applications ancillary to the due performance of its functions, namely, the administration of justice at the hearing of the cause."(*t*)

§ **1126**. In one case, where the validity of the contract was disputed, Lord Langdale, M. R., refused a motion for an injunction to restrain the vendor from letting or selling the estate pending the hearing, on the ground that a lessee or purchaser *pendente lite* would take subject to the plaintiff's rights.(*u*) And in another case, where, on the plaintiff (purchaser) making his interlocutory application, it was not clear that he would be able at the hearing to establish his right to specific performance, the court of appeals refused, on the ground of comparative convenience, to restrain the vendor by injunction until the hearing from selling the property in dispute, it appearing that the grant of the injunction would, if the plaintiff ultimately failed, do more injury to the defendant than its refusal would occasion to the plaintiff should he ultimately be successful.(*v*) Turner, L. J., however, in his judgment in the last cited case, distinctly affirmed the general principle that, if there is a clear valid contract for sale, the court will not permit the vendor afterwards to transfer the legal estate in a third person, although such third person would be affected by *lis pendens*.(*w*)

(*s*) Smith v. Peters, L. R. 20 Eq., 511. Cf. infra, § 1564

(*t*) L. R. 20 Eq., 513.

(*u*) Turner v. Wright, 4 Beav., 40.

(*v*) Hadley v. The London Bank of Scotland, Limited, 3 De G. J. & S., 63. Cf. Garrett v. Banstead and Epsom Downs Railway Co., 4 De G. J. & S., 462; Munro v. Wivenhoe and Brightlingsea Railway Co., 4 De G. J. & S., 723

(*w*) 3 De G. J. & S., 70, where the Lord Justice also suggests a probable explanation of a (seemingly) contrary dictum of Lord Eldon in Spiller v. Spiller, 3 Sw., 557.

§ **1127**. It is hardly necessary to remark that the court will not restrain a person who is under contract to buy an estate from buying another, merely on the ground that the completion of the second purchase may incapacitate him to complete the first.(*x*)[1]

§ **1128**. The court will, in some cases, restrain even third persons, whose rights are independent of the contract, from acting in a manner which would prejudice the plaintiff in respect of the property. For instance, where after a contract for the sale of an advowson the incumbent died, and a bill was filed against the vendor and the bishop, the court restrained the vendor from presenting, and the bishop from instituting, or, in case of a lapse taking place pending the suit, from collating to the living any clerk not nominated by the plaintiff.(*y*)

§ **1129**. Other cases in which the court has restrained by injunction acts inconsistent with the due performance of the contract have been discussed in a previous chapter.(*z*)

§ **1130**. The Court of Chancery used to grant injunctions to restrain actions at law for the deposit upon its being paid into court;(*a*) and to restrain actions at law for damages for delay in completion;(*b*) or in which the defense was a contract between the parties which the court of law could not specifically enforce;(*c*) and it had jurisdiction to restrain parties from applying for probate or the grant of letters of administration, and would so restrain them if it were necessary for the purpose of enforcing a contract which they had entered into.(*d*) But whether, in a suit for the specific performance of a contract for a separation deed between husband and wife, it would have been within the province of the Court of Chancery to interfere by injunction to restrain a suit in the court of probate for the restitution of conjugal rights, as incident to the main object of the suit in equity, can hardly be said to have been determined, though it was twice discussed by the House of Lords in the case of Wilson v. Wilson,(*e*) opposite opinions having been

(*x*) Syers v. Brighton Brewery Co. (Limited), 13 W. R., 220.
(*y*) Nicholson v. Knapp, 9 Sim., 326.
(*z*) Part III., chap. xvi., § 834 et seq.
(*a*) Fordyce v. Ford, 4 Bro. C. C., 494.
(*b*) Duke of Beaufort v. Glynn, 3 Sm. & G., 213, 226. See too Viney v. Chaplin, 2 De G. & J., 468 (action for purchase-money)
(*c*) Waterlow v. Bacon, L. R. 2 Eq., 514.
(*d*) Per Mellish, L. J., in Wilcocks v. Carter, L. R. 10 Ch., 444.
(*e*) 1 H. L. C., 538; S. C. 5 H. L. C., 40.

expressed on the point by the learned lords by whom that case was decided.

§ **1131**. Under the present practice (judicature act, 1873, s. 24, subs. 5), no cause or proceeding pending before the high court or the court of appeal can be restrained by injunction, but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might, if the judicature act, 1873, had not been passed, have been obtained, either unconditionally or on any terms or conditions, may be relied on by way of defense thereof. It is by the same sub-section enacted that nothing in that act contained shall disable either of the said courts [the high court and the court of appeal], from directing a stay of proceedings in any cause or matter pending before it if it shall think fit; and that any person, whether a party or not to any such cause or matter, who would have been entitled, if that act had not been passed, to apply to any court to restrain the prosecution thereof, shall be at liberty to apply to the said courts respectively by motion in a summary way for a stay of proceedings in such cause or matter either generally, or so far as may be necessary for the purpose of justice; and that the court shall thereupon make such order as shall be just.

§ **1132**. In other words, the defendant to an action who desires to avail himself of some matter which would formerly have been a ground for asking the Court of Chancery to restrain proceedings in another court, has now two courses only open to him:—he may plead the matter as a defense to the action, or he may make it the ground of an application to the court in which the action is pending to stay the proceedings in an action.(*f*)

3. *Enforcement of right resulting from non-performance.*

§ **1133**. The court will, in a proper case, grant an injunction for the purpose of enforcing a right resulting to the applicant from the non-performance of the contract.

§ **1134**. Thus, where a decree had been made declaring that a contract between a railway company and the rector

(*f*) Garbutt v. Fawcus, 1 Ch. D., 155; Re People's Garden Co., 1 Ch. D., 44.

of W. for the purchase by the company of certain glebe lands of which the company had taken possession before the institution of the suit ought to be specifically performed, and that the plaintiff was entitled to a vendor's lien, and directing the company to pay the purchase-money by a day named, with liberty for the plaintiff, in case of default, to apply for the purpose of enforcing his lien; and, default having been made by the company, an order had been made for the sale of the lands, but two attempts to sell had proved unsuccessful: Lord Selborne finally ordered that, in default of the company paying the purchase-money with interest and costs into court within a month after service of the order, an injunction should be awarded to restrain them from continuing in possession of the lands.(*g*)

§ 1135. With regard to the extent of the court's jurisdiction in injunction, it is to be observed that the judicature act, 1873, enacts (s. 25, subs. 8) that an injunction may be granted by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made, but does not in terms extend this wide power to the grant of injunctions at the trial. It seems, however, that the effect of the above enactment, read in connection with the 76th section of the same act and the common law procedure act, 1884 (sections 79, 81, 82), is to give the court an unlimited power of granting an injunction at any stage of any case where it would, according to sufficient legal reasons or on settled legal principles, be right or just to do so.(*h*)[1]

(*g*) Williams v. Aylesbury & Buckingham Railway Co., 21 W. R., 819; Seton, 1331; infra, § 1149 Disinguish Pell v. Northampton and Banbury Junction Railway Co., L. R. 2 Ch., 100; Latimer v. Aylesbury and Buckingham Railway Co., 9 Ch. D., 385; and consider Lord Nelson v. Salisbury and Dorset Junction Railway Co., 16 W. R., 1074.

(*h*) Beddow v. Beddow, 9 Ch. D., 89, 93; Cf. Thomas v. Williams, 14 Ch. D., 873; and per Bacon V. C. in Dicks v. Brooks, 15 Ch. D., 25.

[1] *Execution.*] Unless the complainant has a good defense at law, and was prevented from availing himself of the same by mistake, suprise or fraud, without negligence on his part, an injunction will not be granted to restrain the execution of a judgment. Hill v. Reifsnider, 46 Md., 555. Where the judgment entered is contrary to an express agreement between the parties, an injunction will be granted. Kent v. Ricards, 3 Md. Ch., 392. A clear agreement was violated. Held, that an injunction would be granted. Reily v. Miami Ex. Co., 5 Ohio, 333.

Balance of equities.] In a case where either party may suffer by the granting or withholding of an injunction, the equitable rule appears to be that the court must balance the inconveniences likely to be sustained, and to grant or withhold

the injunction according to sound discretion. Gray v. Ohio R. R. Co., 1 Grant, 412; Rich,'s App., 57 Pa. St., 105.

Balance of proof.] Where the proof is so equally balanced as to leave the contract in doubt, this will furnish sufficient cause to deny the application for an injunction. Brown's App., 62 Pa. St., 17.

Mandatory injunction.] The courts grant mandatory injunctions, in this country, with great reluctance. Washington Univ. v. Green, 1 Md. Ch., 97; Audenreid v. Phila. and Read. R. R. Co., 68 Pa. St., 370.

Covenant not to build] Land was sold, and a covenant entered into, not to erect a building more than ten feet in height; an injunction was granted to restrain. Clark v. Martin, 49 Pa. St., 289.

CHAPTER III.

OF THE WRIT OF NE EXEAT.

§ **1136.** The Court of Chancery sometimes issued a writ of *ne exeat* in suits for for specific performance.(*a*)[1]

§ **1137.** It is conceived that this writ, though not abolished, will in future probably not be often applied for in actions of the kind with which this treatise is concerned; inasmuch as, under the present practice, it is not likely to be issued except in cases where the party applying for the writ can satisfy the court on all the points on which proof is required by the provisions of the 6th section of the debtors act, 1869;(*b*) under which if the plaintiff in any action in the court in which, before the year 1870, the defendant would have been liable to arrest proves, at any time before final judgment, by evidence on oath to the satisfaction of the judge, that the plaintiff has good cause of action against the defendant to the amount of £50 or upwards, and that there is probable cause for believing that the defendant is about to quit England unless he be appre-

(*a*) Raynes v. Wise, 2 Mer., 472; Blaydes v. Calvert, 2 J. & W., 211; Boehm v. Wood, T. & R., 332; Jenkins v. Parker, 2 My. & K., 5; Morris v. McNeil, 2 Russ., 604; and see Seton, 316, 1329.

(*b*) See Drover v. Beyer, 13 Ch. D, 242, 243.

[1] A complainant is not entitled to a writ of *ne exeat* on a bill for the specific performance of a contract, previous to the time at which the contract is to be performed, and before any right of action has accrued thereon, either at law or in equity, against the defendant. The debt must be shown to be actually due. De Rivafinoli v. Corsetti, 4 Paige, 264; Brown v. Haff, 6 id., 535. It has been laid down that a writ of *ne exeat* cannot be granted, unless, 1. There is a precise amount of debt positively due. 2. It must be an equitable demand on which the plaintiff cannot sue at law, except in cases of account, and a few others of concurrent jurisdiction. 3. The defendant must be about to quit the country, proved by affidavits as positive as those required to hold to bail at law. Rhodes v. Cousins, 6 Randolph, 188. But in Alabama the rule is not precisely the same. Writs of *ne exeat* may, there, be properly granted, in the following cases: 1. Where the demand is exclusively equitable, whether a sum certain be due or not, and the defendant is about to remove beyond the jurisdiction of the court. 2. Where the courts of law and equity have concurrent jurisdiction, the defendant being about to remove, and where bail has not been obtained, it will be granted in aid of the action at law. 3. Where the two courts have concurrent jurisdiction, and no action at law has been commenced, but in a suit in equity instituted, the removal of the defendant will be restricted. 4. In cases of extreme necessity, and where it becomes necessary to prevent a failure of justice. The fourth clause is, however, not established as a fixed rule of law. Lucas v. Hinckman, 2 Stew., 11.

hended, and that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, the judge may order such defendant to be arrested and imprisoned for a period not exceeding six months, unless and until he gives security (not exceeding the amount claimed in the action) that he will not go out of England without leave of the court.(*c*)[1]

(*c*) 32 & 33 Vict. c. 62, s. 6; cf. Jud. Act, 1873, s. 76.

[1] *Rule in this country.*] This is a writ of right, rather than a prerogative writ. It is only granted in cases of equitable debts and claims. Seymour v. Hazard, 1 John.'s Ch., 1; Forrest v. Forrest, 10 Barb., 46. It is a *mesne* process, holding the party to equitable bail; it commands the arrest of the party if the bail is not furnished. Adams v. Whitcomb, 46 Vt., 708. Until the party refuses to give the required security he cannot be restrained of his liberty. Bushnell v. Bushnell, 15 Barb., 309.

Writ of capias.] In Samuel v. Wiley, 5 N. H., 353, it was held that the power of a court of equity independently of any statute to obtain security for the performance of its decree by ordering, by a writ of *capias*, the arrest of a party intending to leave the State to avoid such decree is analogous to the practice pertaining to the writ of *ne exeat*.

Attachment.] The remedy may be by an order, that the party within a given time give security, and upon default an attachment will issue for contempt. Attorney General v. Macklow, 1 Price, 289.

No adequate remedy at law.] In order that the writ may be granted it must be affirmatively shown that there is no adequate remedy at law. Orme v. McPherson, 36 Ga., 571.

Courts of concurrent jurisdiction.] Such courts will not refuse this writ merely because the plaintiff has a remedy at law. Lucas v. Hickman, 2 Stew., 11; Mackdonough v. Gaynor, 18 N. J. Eq , 249.

Certainty.] The demand must be capable of being reduced to a certainty. Whitehouse v. Partridge, 3 Swanst., 365; Bonesteal v. Bonesteal, 28 Wis., 245.

Fraud must be shown.] Where this is not done, and the action is not of an equitable nature, this writ will be refused. Malcolm v. Andrews, 168 Ill., 100.

Where the contingency might never happen, the writ was refused. *Anon.*, 1 Atk., 521.

Partnership settlements.] The defendant had sold all his property and was threatening to leave the State; he refused a partnership settlement. Held, that this writ was properly issued. Dean v. Smith, 23 Wis., 483; Myer v. Myer, 25 N. J. Eq., 28.

Rule in Arkansas.] In this State this writ is allowed by statute in cases of executory contracts, and the time for performance has not arrived, if the complainant entered into the contract in good faith and without notice on the part of the defendant that he intended to leave the State. Gresham v. Peterson, 25 Ark., 377.

CHAPTER IV.

OF RELIEF AFTER JUDGMENT.

§ **1138**. It may and not unfrequently does happen that, after judgment has been given for the specific performance of a contract, some further relief becomes necessary, in consequence of one or other of the parties making default in the performance of something which ought under the judgment to be performed by him or on his part; as, for instance, where a vendor refuses or is unable to execute a proper conveyance of the property, or a purchaser to pay the purchase-money. The character of the consequential relief appropriate to any particular case will of course vary according to the nature of the subject-matter of the contract and the position which the applicant occupies in the transaction; but in every case the application must, under the present practice, be made only to the court by which the judgment was pronounced,(*a*) and the multiplicity of legal proceedings which sometimes(*b*) occurred before the fusion of the jurisdictions of the Courts of Chancery and common law is now practically impossible.(*c*)[1]

(*a*) Jud. Act, 1873 (36 & 37 Vict. c. 66), s. 24 (5); Appell. Juris. Act, 1876 (39 & 40 Vict. c. 59), s. 17.

(*b*) Phelps v. Prothero, 7 De G. M. & G., 722; Ford v. Compton, 1 Cox 296; Reynolds v. Nelson, 6 Mad., 290; Frank v Basnett, 2 My. & K., 618.

(*c*) Jud. Act, 1873, s. 24 (7).

[1] It is well settled that, while proceedings are pending in the court of chancery, all applications to other courts are looked upon with jealousy. It is a rule thoroughly established, that chancery will administer complete redress to the parties, and this, though in its progress it may decree on a matter which was cognizable at law. Where equity can do complete justice between the parties, it will never turn them out of court to pursue their remedy at law. Cathcart v. Robinson, 5 Pet., 263; Beardsley v. Halls, 1 Root, 366; Milter v. McCann, 7 Paige, 457; Chinn v. Heale, 1 Munf., 63; McRaven v. Forbes, 6 How. (Miss.), 569; Hume v. Long, 6 Monr., 116; Miami Exporting Co. v. United States Bank, Wright, 249; Oliver v Pray, 4 Ham., 175; Brown v. Gardner, Harring.'s Ch., 291; Hawley v. Sheldon, id., 420. So where a bill was filed against a mortgagee, who was also lessee of the mortgaged premises, to obtain a set-off of the rent against the amount due on the mortgage, the bill was retained to compel payment of the rent, though the plaintiff failed to support his claim of set off. Walcott v. Sullivan, 1 Edw.'s Ch., 339. Again, where, on a bill by a vendor to enforce the specific performance of a contract for the sale of land, it appeared that by the contract the vendee had the right to relieve himself from the purchase by paying a stipulated sum, it was held that the right of the vendor to come into equity for a specific performance being clear, the court, in refusing to decree such specific performance, might decree the payment by

§ **1139**. There are two kinds of relief after judgment for specific performance of which either party to the contract may, in a proper case, avail himself.

§ **1140**. (1) He may obtain (on motion in the action) an order appointing a definite time and place for the completion of the contract by payment of the unpaid purchase-money and delivery over of the executed conveyance and title deeds.(*d*) or a period within which the judgment is to be obeyed, and, if the other party fails to obey the order, may thereupon either at once issue a writ of sequestration against the defaulting party's estate and effects,(*e*) or, if the default was in some act other than or besides the payment of money, may move, on notice to the defaulter, for a writ of attachment against him.(*f*) Indeed, in a case where a person who had agreed to accept a lease would not, though ordered by the court to do so, execute the lease, it was held that an attachment was the only means to which the court could resort for enforcing such execution.(*g*)

§ **1141**. (2) He may apply to the court (by motion in the action) for an order rescinding the contract. On an application of this kind, if it appears that the party moved against has positively refused to complete the contract, its immediate rescission may be ordered: otherwise, the order will be for rescission in default of completion within a limited time:(*h*) and the court will decline to order the deposit

(*d*) Morley v. Clavering, 30 Beav., 108; Dorling v. Evans, before Bacon, V. C., 18 July, 1878 (cited Seton, 1328).

(*e*) Order XLVII. r. 1. Cf. the Debtors Act, 1869, s. 8.

(*f*) See Rule 6 of the Order (7th Jan. 1870), under the Debtors Act, 1869; and Order XLIV. r. 2.

(*g*) Grace v. Baynton, 25 W. R., 506

(*h*) Foligno v. Martin, 16 Beav., 586; Simpson v. Terry, 34 Beav., 423; Clark v. Wallis, 35 Beav., 460; Henty v. Schroder, 12 Ch. D., 666.

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the vendee of such stipulated sum to the vendor, although the vendor might have received the same at law. Cathcart v. Robinson, 5 Pet., 263; Long v. McMillan, 5 Dana, 484, is an authority of similar nature. In that case the defendant denied fraud, alleging that through mistake he had not received sufficient credit; and it was held that although the remedy was complete at law, yet, as the subject matter of the bill and cross-bill were connected the court might take jurisdiction. Upon the same general principle, where a note was made payable in the year "one thousand eighteen hundred and thirty-six" by mistake for 1836, it was held that chancery would correct the mistake on a bill for that purpose, and having obtained jurisdiction for that purpose would enforce payment of the note. Savage v. Berry, 2 Scam., 545. And though chancery will not reverse the judgment of a court of law, nor decide against a point decided in such court, they will, nevertheless, hear the same subject of controversy upon grounds not litigated at law, either for want of legal testimony, supplied in chancery by the party's oath, or because it was a subject of equity jurisdiction only, or perhaps for other causes, and enjoin the judgment at law; even though the grounds may, at the time of the injunction, be cognizable at law, if they were not so considered by the courts of law when the judgment was rendered and the bill brought. Dana v. Nelson, 1 Atk., 252.

to be returned to a defaulting purchaser.(*i*) An order for the defendant to pay the plaintiff's costs, and a stay of further proceedings in the action, may also be obtained on this motion.

§ 1142. In some cases the order has expressly excepted from the stay of proceedings any application to the court to award and assess damages sustained by the plaintiffs by reason or in consequence of the breach of the contract.(*j*)

In Henty v. Schroder,(*k*) however, Jessel, M. R., declined to make this exception, considering that the plaintiffs could not at the same time obtain an order to have the contract rescinded and claim damages for the breach of it. If this be so, it would seem that in many cases the court must fail to give the plaintiff the full measure of relief requisite for replacing him in the position in which he stood before the contract,—the payment for instance, of expenses incurred by him in showing his title.

§ 1143. The vendor has in many cases another form of relief open to him after a judgment for specific performance, in the enforcement of his lien for unpaid purchase-money, with interest and his costs of the action.

§ 1144. "Although," said Bacon, V. C.,(*l*) "the rule of law upon which the doctrine of an unpaid vendor's lien depends must be very frequently influenced by the particular circumstances of each case in which it is said to arise, there is one plain principle which guides and governs its application in all cases. If it be expressed, or can be safely and properly inferred from documentary or other evidence, or from the nature of the contract, that it was the intention of the parties that the sale or transfer, however absolute in its terms, was subject to the condition that the purchase money should be paid, or that the thing contracted to be done by the vendee should be performed, the lien will prevail. If, on the other hand, no such inference can be properly drawn, if the performance of the thing contracted to be done by the vendee was not the condition upon which the transfer was made, but the engagement to do the thing was the consideration for the transfer, the vendor, having accepted that

(*i*) Dunn v. Vere, 19 W. R., 151.
(*j*) Sweet v. Meredith, 4 Giff., 207; Watson v. Cox, L. R. 15 Eq., 219. See too Corporation of Hythe v. East, L. R. 1 Eq., 620.
(*k*) 12 Ch. D., 666.
(*l*) In Re Albert Life Insurance Co., L. R. 11 Eq., 178.

engagement, has the very thing he bargained for, and cannot say that the consideration has not passed to him. In such cases the lien cannot prevail. The rule I have mentioned and its application cannot be more pointedly illustrated nor more clearly explained than in the judgment of lord Cranworth in Dixon v. Gayfere."(*m*)

§ **1145**. Where this lien exists, a vendor obtaining judgment for the specific performance of a contract for the sale of hereditaments of any tenure may have embodied in the judgment a declaration of the lien, and a clause giving him liberty to apply to the court, in case of need, for its enforcement.(*n*) Then, if default in payment of the moneys payable under the judgment by the purchaser ensues, the vendor may have further relief in some or all of the following ways as occasion may require, viz.:—

(1) By sale of the propecty.

(2) By the appointment of a receiver pending the sale.

(3) By means of an injunction operating to restore to him the possession of the property.

§ **1146**. (1) Upon the vendor satisfying the court that the purchaser has made default in payment of the moneys directed by the judgment to be paid, an order will be made, on motion or petition in the action, for the sale(*o*) by the court of the property comprised in the contract, and the vendor may have liberty to bid.(*p*) The proceeds of the sale will be directed to be paid into court, and leave will be reserved to the vendor to apply in chambers for payment.(*q*)

§ **1147**. A vendor of land to a railway company is, with respect to his right to such an order, in no different position from any other vendor, and, if the company fail to pay, is entitled to have the land sold, although the rail-

(*m*) 1 De G. & J., 655. See further Mackreth v. Symmons, 15 Ves. 329, and the note on that case in 1 W. & T. Lead. C. (4th ed.), 289; and cf. Mycock v. Beatson, 13 Ch D., 384.

(*n*) Heath v. Metropolitan Railwy C., cited Seton, 1330; Walker v. Ware Badham and Buntingford Railway Co., L. R. 1 Eq., 195; Vyner v. Hoylake Railway Co., 17 W. R., 92; Wing v. Totenham and Hampstead Junction Railway Co., L. R. 3 Ch., 741; Munns v. Isle of Wight Railway Co., L. R. 5 Ch., 414; Bee v. Stafford and Uttoxater Railway Co., 23 W. R. 868; Keane v. Athenry and Ennis Junction Railway Co., 19 W. R., 43. In Sedgwick v. Watford and Rickmansworth Railway Co., 36 L. J. Ch., 379, an immediate sale was directed.

(*o*) Munns v. Isle of Wight Railway Co., L. R. 5 Ch., 414; Williams v. Aylesbury and Buckingham Railway Co., 21 W. R., 819; Lycett v. Stafford and Uttoxeter Railway Co., L. R. 13 Eq., 261.

(*p*) Lycett v. Stafford and Uttoxeter Railway Co., L. R. 13 Eq., 261; Ware v. Aylesbury and Buckingham Railway Co., 21 W. R., 819.

(*q*) Vyner v. Hoylake Railway Co., cited Seton, 1331.

way may have been actually made and may be ready or even opened for traffic.(*r*)

§ **1148**. (2) Where profit is capable of being made of the property pending the sale, that profit ought to be made.(*s*) The court will accordingly, in a proper case, upon the vendor's application, appoint a receiver of the property and direct the defaulting purchaser to let him immediately into possession.(*t*)

§ **1149**. (3) In a case that came before Lord Selborne, two attempts to sell the subject-matter of the contract—land of which the purchasers, a railway company, had taken possession and over which they had constructed their railway—having proved abortive, his lordship, on the application of the vendor, discharged the order for sale and directed the defendants within a month to pay the unpaid purchase-money with interest into court; and the order went on to direct that, in default of such payment into court, an injunction should be awarded restraining the defendants from running trains over the land and from continuing in possession of the land, and that the vendor should be put in possession of the land.(*u*)

§ **1150**. In a previous case Lord Romilly, M. R., finally ordered a writ of assistance to issue to put the vendor in possession of the lands comprised in the contract.(*v*)

§ **1151**. Lastly, a purchaser who has obtained a judgment in his favor for the specific performance of a contract concerning land may, if for any reason he cannot otherwise get a proper and complete conveyance of the purchased property, apply to the court for an order vesting it in him or appointing some one to convey it to him, with a release, where necessary, of contingent rights.(*w*)

(*r*) Wing v. Totenham and Hampstead Junction Railway Co., L. R. 3 Ch., 741; Keane v. Athenry and Ennis Junction Railway Co., 19 W. R. 43; Earl of Jersey v. South Wales Mineral Railway Co., 19 L. T. N. S., 446.

(*s*) Per Giffard, L. J., in Munns v. Isle of Wight Railway Co., L. R. 5 Ch., 419.

(*t*) Munns v. Isle of Wight Railway Co., L. R. 5 Ch., 414; Ware v. Aylesbury and Buckingham Railway Co. 21 W. R. 819. Distinguish Latimer v. Aylesbury and Buckingham Railway Co., 9 Ch. D., 385.

(*u*) Williams v. Aylesbury and Buckingham Railway Co., 21 W. R., 819; S. C. (final order). Seton, 1331.

(*v*) Vyner v. Hoylake Railway Co., cited Seton, 1331.

(*w*) Trustee Act, 1850 (13 & 14 Vict. c. 60), s. 30. For cases under this section see Seton, 528–531. The application is usually by summons, Cons. Ord., XXXV., r. 1, (4); but in Wellesley v. Wellesley, 4 De G. M. & G., 537, the order was made on a petition.

PART V.

OF INCIDENTAL MATTERS.

CHAPTER I.

OF CONDITIONS OF SALE AND PARTICULARS.

§ 1152. The conditions of sale subject to which property is sold constitute part of the contract. Particular conditions of sale are considered in several other parts of this treatise.(*a*) But it will be desirable here briefly to state the general principles upon which the court acts in construing conditions.

§ 1153. It is to be observed, in the first place, that the circumstances connected with the title and character of the property are, of course, in the knowledge of the vendor rather than of the purchaser; and secondly that, subject to any stipulation to the contrary in the contract, the legal right of a purchaser is to have a good title, according to the rules laid down in the vendor and purchaser act, 1874, and an estate free from all incumbrances;(*b*) and, therefore, that conditions tending to give the purchaser less than this are in restraint of a legal right.(*c*)

§ 1154. Proceeding on these principles, the courts have held that it is incumbent on the vendor to express himself with reasonable clearness, and, in the case of sales by auction, so to state his plans, particulars, and conditions of sale as to convey clear information to the class of persons who ordinarily frequent auctions.(*d*) If the vendor uses terms reasonably capable of misconstruction or ambiguous words, the purchaser is not bound to take on himself the

(*a*) E. g. §§ 1023 et seq. (rescission), 1046 et seq. (time), 1204–21 and 1251–61 (compensation), 1287–97 (title). See, also, St. Leon. Vend., ch. i., s. 2.

(*b*) Phillips v. Caldcleugh, L. R. 4 Q. B., 159; Gatayes v. Flather, 34 Beav., 388.

(*c*) As to conditions precluding inquiry as to title, see Jones v. Clifford, 3 Ch. D., 779; Waddell v. Wolfe, L. R. 9 Q. B., 515; and infra, § 1287 et seq.

(*d*) Gibson v. d'Este, 2 Y. & C. C. C., 542, 558–9; Dykes v. Blake, 4 Bing. N. C., 463, 476. See, too, per Lord Westbury in Cordingley v. Cheeseborough, 4 De G. F. & J., 384.

peril of ascertaining the true meaning of the statement,(*e*) but may generally construe it in the manner most advantageous to himself:(*f*) and it may be gathered from the case of Taylor v. Martindale(*g*) that, where a condition of sale is so obscurely worded that, taken in connection with the particulars, it is likely to mislead an ordinary person as to the nature of the property, the court will on that ground alone, and even on the argument of a summons to vary the certificate as to title, discharge a purchaser from his bargain.

§ **1155**. The case of Torrance v. Bolton(*h*) affords a notable illustration of this principle. There the advertised particulars described property about to be offered for sale as an absolute immediate reversion of a freehold estate, to fall into possession on the death of a lady in her 70th year, and no conditions of sale were issued, but just before the auction the auctioneer's clerk read out from a manuscript a string of conditions, in one of which the property was stated to be subject to three mortgages, and it was stipulated that the purchaser should take a conveyance subject to them. On the purchaser proving that he bought without distinctly hearing or understanding the effect of this condition, it was held by the court of appeals in chancery that he was entitled to have the contract rescinded, on the ground that the description in the particulars was misleading, and *onus* was therefore on the vendor to show (which he failed to do) that the purchaser was not actually misled.

§ **1156**. Again where, on a sale by auction in four lots of leaseholds in Liverpool, it appeared from the particular and conditions that three of the four lots were held under the corporation, upon whose leases there is usually only a nominal rent reserved; and as to the fourth lot, the particular stated the rents at which the houses comprised in it were underlet, and that it was subject to a mortgage for £500, but by an accidental slip neither particular nor condition mentioned the fact that the lots was subject to a

(*e*) Martin v. Cotter, 3 Jon. & L., 496; Graves v. Wilson, 25 Beav., 290. Cf. Torrance v. Bolton, L. R. 8 Ch., 118.

(*f*) Seaton v. Mapp, 2 Coll., 556. See, too, Geoghegan v. Connolly, 8 Ir. Ch. R., 598, 603; Gardiner v. Tate, 1. R. 10 C. L., 460.

(*g*) 1 Y. & C. C. C., 658. Cf. Jones v. Rimmer, 14 Ch. D., 588.

(*h*) L. R. 8 Ch., 119. Cf. Re Arnold, 14 Ch. D., 270.

ground rent of £43, 17*s.* 6*d.*; upon the purchaser of this lot applying to be discharged from his purchase, deposing that he had bought under the belief that the property was not subject to any ground-rent, it was held that he was entitled to be discharged with costs.(*i*) "The real question I think," said Jessel, M. R., "is, is this a fair particular; is it one in which a purchaser is told what he has to buy, so as to enable him to form an idea of the value of the thing to be purchased. * * * No doubt the purchaser, if he had been a careful purchaser, would have inquired. But is it for the vendor who sends out such a statement as this of the nature of the property to say that the purchaser only was careless? I think the vendor also was careless. It cannot be said to be a fair mode of drawing a particular of sale of leasehold houses subject to a ground-rent of £43 a year, to say nothing about the rent."(*j*)

§ **1157.** So where there was an ambiguity as to which of two leases was referred to, the purchaser's construction was admitted by the court, and the bill dismissed.(*k*) So a condition that no title should be called for prior to a lease was not held so explicit as to preclude inquiry into dealings with the contract for the lease which had taken place prior to its being granted.(*l*) And where a vendor selling a reversionary estate stipulated that a statement in a deed of 1836 that a life annuity had not been paid for eight years, and a declaration by the vendor that no claim had been made on him since 1841, and that he believed the annuity had not been claimed for the last twenty years, should be conclusive evidence that the annuity had determined; and it appeared that the annuity was granted by a person entitled only in reversion, and was granted for the life of the survivor of four persons; it was held that the description of it as a life annuity was likely to lead to the belief that the annuity was for one life only, and that the omission to state the facts disentitled the vendor to specific performance.(*m*) And so, again, where property sold was described as subject to articles of agreement, bearing date 1804, for a lease for four lives and one year, and in fact the

(*i*) Jones v. Rimmer, 14 Ch. D., 588.
(*j*) 14 Ch. D., 591, 592. See Sheard v. Venables, 15 W. R., 1166.
(*k*) Seaton v. Mapp, 2 Coll., 556.
(*l*) Rhodes v. Ibbetson, 4 De G. M. & G., 787.
(*m*) Drysdale v. Mace, 2 Sm. & Gif., 225, affirmed 5 De G. M. & G., 103; cf. Geoghegan v. Connolly, 8 Ir. Ch. R., 598.

terms of the agreement were such that the lives were not named until 1845, this was considered so ambiguous as to amount to an objection to the performance of the contract.(*n*)

§ **1158**. In Phillips v. Caldcleugh(*o*) the plaintiff contracted to buy a house, described in the particulars as "a freehold residence," subject to conditions, one of which was that the abstract should commence with a conveyance of April, 1860, and no objection should be taken in respect of the prior title, and another provided that if any error should appear to have been made in the particulars it should not annul the sale. The abstract of the deed of April, 1860, showed it to have been a conveyance of the property, subject "so far as the same premises were subject thereto," to the (unspecified) covenants and conditions on the guarantee's part contained in an indenture (not abstracted) of March, 1850. It was held that, the property having been sold as freehold, neither of the above conditions protected the vendors from explaining what these covenants and conditions were, and showing that the property was unincumbered by them.

§ **1159**. The inclination of the courts to construe conditions of sale strictly is shown by many other cases,(*p*) but, perhaps, it is not more strongly illustrated by any than one at the rolls, where, on a sale of leaseholds, one of the conditions stipulated that the possession under the lease should be deemed conclusive evidence of the due performance, or sufficient waiver, of any breach of the covenants in the lease up to the completion of the sale: Lord Romilly, M. R., held that this condition covered all breaches up to the date of the contract, but not a breach between the contract and completion for which the lessor was entitled to enter, and that notwithstanding the express words "up to the completion of this sale."(*q*)[1]

(*n*) Martin v. Cotter, 3 Jon. & L., 496. See, too, Gardiner v. Tate, I. R. 10 C. L., 460 where an equitable interest was described in langnage which might naturally be read as importing a legal interest.

(*o*) L. R 4 Q. B., 159.

(*p*) Southby v. Hutt, 2 My. & Cr, 207; Symonds v. James, 1 Y. & C. C. C., 487; Adams v. Lambert, 2 Jur., 1078; Cruse v. Nowell, 25 L. J. Ch., 709 (Kindersley, V. C.); Brumfit v. Morton, 3 Jur. N. S., 1198 (Stuart, V. C.); Cox v. Coventon, 13 Beav., 378; Russell v. Harford, L. R. 2 Eq., 507 (construction of condition as to rights of water and easements); cf. Brooks v. Drysdale, 3 C. P. D., 52 (construction of the word "covenant" in a contract for sale); and see §§ 1296, 1297.

(*q*) Howell v. Kightley, 21 Beav., 331.

[1] Dykes v. Blake, 4 Bing. (N. C.), 463, is a case in point. There several lots were sold by number. The plaintiff purchased lots Nos. 12 and 13. In lot

§ **1160**. Again, where one of the conditions stipulated that all objects should be delivered within fourteen days from the delivery of the abstract, and another that "if the purchaser shall fail to comply with these conditions his or her deposit shall be thereupon actually forfeited to the vendors;" and after the expiration of the fourteen days the purchaser delivered an objection showing a fatal defect in the title; the ground upon which the majority of the court proceeded, in holding him entitled to recover his deposit, was that the latter condition did not apply to the case of vendors unable to give a good title.(*r*)

§ **1161**. Where on the sale of leaseholds, the conditions provided that the purchaser should have possession on the 14th of November, all outgoings up to that day being cleared by the vendors, the purchaser was held to be entitled to insist that an apportioned part of the current rent from the last quarter-day to the 14th of November was an "outgo-

(*r*) Want v. Stallibross, L. R. 8 Ex., 175.

No. 7 there was a reservation to the occupants of that and other lots, of a carriage-way and foot-path, over lot No. 13; but the plans and particulars did not show any such right of way: the lease of lot No. 7 not being at the place of sale, although referred to by the descriptions and particulars. It was held that the plaintiff might rescind the contract *in toto*, the agreement being entire. See, also, Adams v. Lambert, 2 Jur., 1078; Judson v. Wass, 11 John., 526. And a vendor will be held to make good his descriptions and particulars uncontrolled by verbal statements made at the time of the sale by the auctioneer. Gunnis v. Erhart, 1 H. Bl, 289; Olgivie v. Foljambe, 3 Meriv., 53; Rich v. Jackson, 4 Bro. C. C., 514. But it seems that declarations so made are admissible as evidence to explain the written terms of the conditions of sale: and they were so admitted in Cannon v. Mitchell, 2 Dessau., 320, where it was stated publicly by the agent of the vendor, at an auction sale of two tide mills, and also by the auctioneer, that the stream upon which the mills were situated was to be kept open for the use of both, although the written terms of sale contained no such statement. It has been said that an estate cannot be too minutely described in the particulars: for although it is impossible that all the particulars relative to the quantity, situation, etc., should be so specifically laid down as to call for some allowance when the bargain comes to be executed, yet, if a person, however little conversant with the actual situation of his estate, will give a description, he must be bound by that, whether conversant with it or not. Although it is not to be supposed that no care or diligence is required of the purchaser. If every nice and critical objection be admissible, and sufficient to defeat the sale, it would greatly impair the efficacy and value of public judicial sales; and, therefore, if the purchaser gets substantially the thing for which he bargained, he may generally be held to abide by the purchase, with the allowance of some deduction from the price by way of compensation for any small deficiency in the value, by reason of the variation. Pars. Contr., vol. 1, p. 415, note (t). See Foley v. McKeon, 4 Leigh, 627. It appears, further, that any declaration, in the terms of the sale, that such sale shall not be avoided by any misdescription of the property, on the part of the vendor, will be without effect, and the contract may be rescinded, if the variation is of moment. Duke of Norfolk v. Wortley, 1 Camp., 237; Stewart v. Alliston, 1 Mer., 26; see, also, Robinson v. Musgrove, 2 Mood & Rob., 92; see post, § 803.

ing" within the meaning of the conditions.(*s*) And a stipulation that purchasers are to receive "all rents and profits" from the day fixed for completion has been held to entitle them to an occupation rent from the vendors, on the latter remaining in possession after that day.(*t*)

§ **1162**. The court, construing conditions thus strictly, will not by implication extend the terms of one condition so as to enlarge another beyond what it actually expresses. In the case of Southby v. Hutt,(*u*) the interpretation of conditions in this respect was fully considered. There, by the conditions of sale, the vendor agreed to deliver an abstract and deduce a good title, except as to part of the estate acquired under an inclosure, as to which he was not to be required to go back beyond the award; and by a subsequent condition it was stipulated that the vendor should deliver to the largest purchaser all deeds in his custody, but should not be required to produce any other deeds than those in his possession and set forth in the abstract: and it was held that the latter condition did not so affect the former as to entitle the vendor to insist on verifying his abstract only so far as could be done by deeds in his possession, but that the purchaser was entitled to a general verification. And so a condition that certain specified deeds only should be given up, does not limit the title to be shown to that disclosed by these deeds.(*v*)

§ **1163**. On the same principle of strict construction, where (as commonly happens), there is a condition that all objections to the title are to be taken within a specified number of days from the delivery of the abstract, or to be deemed waived, and that time shall, in that respect, be of the essence of the contract, the time will not begin to run against the purchaser until the vendor has delivered a perfect abstract.(*w*)

§ **1164**. It is a natural principle of interpretation, that a vendor shall never be allowed to avail himself of the conditions of sale for the purpose of acting fraudulently. The court requires good faith in conditions of sale.(*x*) Accord-

(*s*) Laws v. Gibson, L. R 1 Eq., 135.
(*t*) The Metropolitan Railway Co v. Defries, 2 Q. B. D., 189, 387.
(*u*) 2 My. & Cr , 207; Osborne v Harvey, 7 Jur., 229 See also Gabriel v. Smith, 16 Q. B., 847; and cf. Lord Westbury's judgment in Cordingley v. Cheeseborough, 4 De G. F. & J., 384 et seq.
(*v*) Dick v. Donald, 1 Bli, N. S 655.
(*w*) Hobson v. Bell, 2 Beav., 17; Want v. Stallibrass, L. R. 8 Ex., 175; Cf. Re Jackson and Oakshot, 14 Ch. D. 851.
(*x*) Per Turner, L. J., in Dimmock v. Hallett, L. R. 2 Ch., 28.

ingly a condition for compensation will not apply where there has been misrepresentation ;(*y*) and under a condition giving the vendor a power of rescission in case of any objections to the abstract, he will not be permitted fraudulently to deliver an imperfect abstract to which objections would necessarily be taken, and thereupon avail himself of his fraud to avoid his contract by means of this condition.(*z*) So it seems that a condition as to objections to title being delivered by a certain time, would not apply where there had been misrepresentation ;(*a*) and a condition not drawn *bonâ fide*, but intended to cover difficulties arising from facts uncommunicated, will not preclude the purchaser from taking the objection which it is designed to guard against.(*b*)

§ **1165.** Further, though there may have been neither fraud nor misrepresentation on the vendor's part, the court will be slow to allow him to get rid of an inconvenient but legitimate requisition by means of a condition giving him a power of rescinding the contract. Thus, where a vendor contracted to sell leasehold property under a *bona fide* belief that there was no charge upon it; and the condition of sale provided that, for the purpose of any objection or requisition, the abstract should be deemed to be perfect if it supplied the information suggesting the same : the abstract delivered contained nothing showing or suggesting the existence of any incumbrance, but during the investigation of the title it was discovered that there was in fact a mortgage on the property, which the purchasers thereupon required the vendor to discharge : it was held that, under the circumstances, the vendor was not entitled to rescind the contract under one of the conditions, which in terms empowered him to do so in the event of the purchasers insisting on any requisition which the vendor should be unable, or on the ground of expense should decline, to remove or comply with.(*c*)

§ **1166.** A condition of sale may, of course, without any intentional fraud or misrepresentation, be in fact misleading or erroneous. It will be bad as misleading if it require the

(*y*) Stewart v. Alliston, 1 Mer., 26. Cf. Brownlie v. Campbell, 5 App. C., 925, 936; and see infra, § 1217.

(*z*) Per Wagram, V. C., in Morley v. Cook, 2 Ha., 111; and see supra, § 1025 et seq.

(*a*) Price v. Macaulay, 2 De G. M. & G., 339, 347. Cf. Boyd v. Dickson, I. R. 10 Eq.' 239.

(*b*) Jackson v. Whitehead, 28 Beav., 159

(*c*) Re Jackson and Oakshott. 14 Ch. D., 158. Cf. Greaves v. Wilson, 25 Beav., 290; Bowman v. Hyland, 8 Ch. D., 588; see supra, § 1025 et seq.

purchaser to assume that which the vendor knows not to be true or if it assert that the state of the title is not accurately known to the vendor, when it in fact is known to him.(*d*)

§ **1167**. On this principle, where one of the conditions being that the title to the beneficial ownership should commence with the will of A. B., and the purchaser should assume that A. B. was at his death beneficially entitled to the property in fee simple free from incumbrances, the abstract showed that A. B. had only entered into a contract for the purchase of the property with persons whose title to sell was doubtful, and had not paid the purchase-money, it was held that the purchaser was not bound by the condition.(*e*)

§ **1168**. Where conditions state facts upon which they are grounded, these facts must be proved (*f*)

Where the vendor states facts, and then states that the purchaser shall take such interest as the vendor under such state of facts has, the purchaser is, it seems, bound to take the title as it is ;(*g*) but where, after stating facts, the conditions add, as a positive and distinct fact, and not as a conclusion of law from the preceding circumstances, that the vendor can make a good title to the fee : as this title may have arisen from indepentent sources, the purchaser is not bound by the title resulting from the facts, but may inquire generally whether the vendor can make out a good title.(*h*)

§ **1169**. With respect to sales by the court, it would be going too far to say that, in such sales, the conditions are dealt with on different principles from those which obtain in ordinary cases. But the court is scrupulously careful not to strain the meaning of any condition framed under its authority,(*i*) nor to allow a purchaser to be prejudiced by any such condition which appears on examination to be misleading or unfair.

§ **1170**. Accordingly where property had been sold under a decree, subject to conditions, one of which provided that no requision should be made in respect of a certain under-

(*d*) Re Banister, 12 Ch. D., 131. See per Jessel, M. R., in Camberwell and South London Building Society v. Holloway, 13 Ch. D., 762 Distinguish Blenkhorn v. Penrose, 29 W. R., 237.

(*e*) Harnett v. Baker, L. R. 20 Eq., 50.

(*f*) Symonds v. James, 1 Y. & C. C. C., 487.

(*g*) Cf. smith v. Watts, 4 Drew., 338; Blenkhorn v. Penrose, 29 W. R., 237 (condition involving neither suppressio veri nor suggestio falsi).

(*h*) Johnson v. Smiley, 17 Beav., 223. Cf. Cox v. Coventon, 31 Beav , 378.

(*i*) E. g. Powell v. Powell, L. R. 19 Eq., 422. See too per Jessel, M. R., in Re Arnold, 14 Ch. D., 273.

lease of 1852, or of any underlease prior to 1864, and it turned out that another underlease (besides that of 1852) had, to the vendors' knowledge, been made prior to 1864, the court held that it was the duty of the vendors to give the fullest information which they themselves possessed as to the title, and therefore to disclose the underlease in question, and that the purchaser was entitled, notwithstanding the condition, to require it to be produced.(*j*)

§ **1171**. So in another case of sale under a decree, where the conditions (settled by one of the conveyancing counsel of the court) stated the facts correctly, and in a manner which might have led a lawyer to the inference that the vendor had no title, but would not lead an ordinary purchaser to that conclusion, Lord Romilly, M. R., refused to enforce specific performance against the purchaser, saying that it was of great importance, particularly in sales by the court, that conditions of sale should distinctly explain any difficulty of title.(*k*)

§ **1172**. In a latter case the same judge relieved a purchaser from a misleading condition on the express ground of the sale having taken place under the authority of the court; but he at the same time intimated that such a condition would be bad in any sale.(*l*) On the other hand, a condition precluding the purchaser from objecting to the court's jurisdiction to order the sale of a reversion in which (as the condition expressly stated) infants were interested was held by the Court of Appeal in Chancery to be fair, reasonable, and binding.(*m*)

§ **1173**. It may here be noticed that if the conditions of sale clearly stipulate that the property will be conveyed subject to specified liabilities, the vendor may enforce the insertion in the conveyance of apt words for giving effect to the stipulation, even though it be not shown or alleged that the property is in fact subject to any of the specified liabilities.

Thus where, on a sale by auction, one of the conditions provided that "the property is sold and will be conveyed subject to all free rents, quit rents, and incidents of tenure, and to all rights of way, water, and other easements, if

(*j*) Edwards v. Wickwar, L. R. 1 Eq., 68, 70.
(*k*) Williams v. Wood, 16 W. R., 1005.
(*l*) Else v. Else, L. R. 13 Eq., 196, 201.
(*m*) Munn v. Hancock, L. R. 6 Ch., 850.

any," it was held that the vendors were entitled to have the words "subject to all free rents, etc.," inserted in the conveyance, notwithstanding the purchasers objection that they were wholly inapplicable to the property.(*n*)

(*n*) Vale v. Squier, 4 Ch. D., 226, affirmed 5 Ch. D., 625. Cf. Sidney v. Clarkson, 35 Beav., 118.

CHAPTER II.

OF COMPENSATION.

§ **1174**. Where a vendor is able to perform the contract in its substance, but unable to perform it liberally in all its parts, he may yet sue the purchaser for its specific performance. On the other hand, where a vendor has not substantially all that he has contracted to sell, he cannot sue for specific performance, but the purchaser may generally insist on taking what the vendor has.

§ **1175**. From these principles arises a right in the purchaser to compensation in respect of the difference between the thing which the vendor insists that he shall take, or he himself insists on taking, and the expressed subject-matter of the contract. It will be shown that the subjects of compensation in the two cases are very different, and that many defects for which the purchaser may obtain compensation will not be made the subjects of compensation at the instance of the vendor.(*a*) The rights of the parties to compensation may be and frequently are qualified by the contract, which in many cases contains a condition on the point.

§ **1176**. It was formerly held that, where the vendor sought to enforce the performance of a contract with compensation, his bill was demurrable, unless it showed that the defect was a fit subject for compensation,(*b*) and in a case before Stuart, V. C., where the whole of the vendor's bill was framed on the view that a good title had been shown by the time prescribed, and that was the sole issue raised by it, the court held that, the plaintiff having failed in that contention, specific performance would not be enforced with compensation.(*c*) It is conceived that, under the present practice, if either party is aware of any case for compensation, and means to insist on it, he ought distinctly to raise the question of his pleading; (*d*) but it seems that compen-

(*a*) Compare Nelthorpe v. Holgate, 1 Call., 203 with Collier v. Jenkins, You., 295. See also Wilson v. Williams, 3 Jur. N. S., 810 (Wood, V. C.)

(*b*) Boyer v. Bright, 13 Pri, 698.

(*c*) Ashton v. Wood, 3 Sm & G., 436.

(*d*) Order XIX. rr., 4, 8, 18.

sation may be granted for a defect appearing on the investigation of title, though the pleadings and judgment make no reference to compensation.(*e*)

§ **1177**. It will be convenient to consider separately (1) the cases where the vendor is the party insisting on the performance of the contract, subdividing these into (a) cases where either the contract contains no condition for compensation, or at any rate no such condition enters into the question, and (b) cases where there is such a condition; and then (2) to deal in a similar way with the cases in which the purchaser is the party insisting on the contract.

1. (a) *Vendor insisting on the contract, there being no condition for compensation.*[1]

§ **1178**. The description by which a thing is contracted to be sold is a matter for which a vendor is *primâ facie* responsible. Accordingly, when he seeks to enforce a contract it is incumbent upon him to show that he is able to perform his part of it. Inasmuch, however, as equity looks to the substance rather than to the mere letter of a contract, if the vendor shows that he can substantially do what he contracted to do, he is entitled to enforce specific perform-

(*e*) Wilson v. Williams, 3 Jur. N. S., 810 (Wood, V. C.).

[1] Compensation for deficiency in the purchase of lands, is essentially a matter of equity jurisdiction. Castleton v. Veitch, 3 Rand., 598. But it is clear that conditions expressly inserted in the articles of sale, to the effect that variations or misdescriptions shall not vitiate the sale, will render the agreement cognizable at law. Adams' Eq., pp. 89, 90. From its more extended jurisdiction, equity has no difficulty in granting aid, to a purchaser who has entered into a contract without knowledge that the other party cannot fulfil his part of the contract *in toto*: and upon a proper case being made by the bill, of enforcing so much of the contract as lies within the power of the vendor, and awarding compensation for the deficiency. The cases upon this point are numerous. Thomas v. Dering, 1 K., 729; Wheatley v. Slade, 4 Sim., 126; Graham v. Oliver, 3 Bea., 124; Nelthorpe v. Holgate, 1 Coll., 203; Couse v. Boyles, 3 Green's Ch., 212; Nelson v. Carrington, 4 Munf, 332; Crenshaw v. Smith, 5 id., 415; Blessing v. Beatty, 1 Rob (Va.), 287; Neal v. Logan, 1 Gratt., 14; Barton v. Bird, 1 Overton, 66; Moss v. Elmendorf, 11 Paige, 277; Hepburn v. Auld, 5 Cranch, 262; Jacobs v. Lake, 2 Ired.'s Ch., 286; Henry v. Leles, id., 407; Weatherford v. James, 2 Ala., 170; Bass v. Gilliland, 5 id., 761; Rankin v. Maxwell, 2 A. K. Marsh., 488; see Jones v Shackleford, 2 Bibb., 410. Nor will equity refuse to grant a specific performance in favor of the vendor, notwithstanding its greater reluctance to interfere in favor of vendors than purchasers. McWhorter v. McMahan, 1 Clark, 400. And there are cases in which a vendor of land may come into equity to compel a specific performance of the contract of sale, although he may have a remedy at law by an action for the purchase money. Phyfe v. Wardell, 5 Paige, 268; see Brown v. Haff, id., 235. All that is required, to obtain a specific performance on the part of a vendor, is that he shall perform his agreement in substance. A mere trifling variation will not defeat a decree. Willard's Eq. Jur., 290; Winne v. Reynolds, 6 Paige,

ance, although he may be unable to do it *modo et formâ* according to the letter of the contract: the difference between what he contracted to do and what he can actually do becoming the subject of compensation.

§ **1179.** "Lord Thurlow," said Lord Eldon, in a passage already cited, "used to refer this doctrine of specific performance to this; that it is scarcely possible, that there may not be some small mistake or inaccuracy: as that a leasehold interest, represented to be for twenty-one years, may be for twenty years and nine months: some of those little circumstances, that would defeat an action at law; and yet lie so clearly in compensation, that they ought not to prevent the execution of the contract."(*f*)

§ **1180.** But "if (to quote Lord Erskine), a court of equity can compel a party to perform a contract, that is substantially different from that, which he entered into, and proceeded upon the principle of compensation, as it has compelled him to execute a contract substantially different, and substantially less than that, for which he stipulated, without some very distinct limitations such a jurisdiction, having all the precision of law, the rights of mankind under contracts must be extremely uncertain."(*g*)

§ **1181.** It falls then to be considered (1) what defects or circumstances will be considered by the court so material or essential as to debar a vendor from enforcing the contract at all, and (2) what, on the other hand, will be held so immaterial or non-essential as to allow of the contract being enforced at his instance.

§ **1182.** (1) The contract will not be enforced against the

(*f*) In Mortlock v. Buller, 10 Ves., 305; Eldon in Calcraft v. Roebuck, 1 Ves. Jun. supra, Part I. chap. ii. § 29. See too per Lord 223, 224

(*g*) In Halsey v. Grant, 13 Ves., 76.

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407. King v. Bardeau, 6 John.'s Ch., 38, is a case in point. Two lots were sold at auction at the same time and to the same person, and the buildings upon the one projected upon the other, and it was held that the vendor might enforce the purchase in equity, because the vendee obtained substantially what he bargained for, and the deficiency was capable of compensation. Henry v. Grady, 5 B. Monr., 450, is very much of the same nature. There was a contract for the conveyance of land, which, although not carried into execution at the time appointed, was not considered by either vendor or vendee as abandoned. The vendor refused to deliver full possession at the time fixed for surrender to the vendee, and the vendee, in consequence, refused to pay the purchase money. It was held that the vendor might enforce a specific performance, because the injury to the vendee in not getting possession was slight, and might be compensated out of the purchase money still to be paid.

purchaser with compensation where a material part of the subject-matter is wanting. Formerly the court went far beyond what it now does in enforcing contracts substantially different from those entered into; as where a wharfinger who contracted for a house and wharf was compelled to take the house without the wharf: but of this mode of proceeding Lord Eldon frequently expressed his disapproval, and it is now abandoned by the court.(*h*) "The court," said Lord Eldon on one occasion, "is from time to time approaching nearer to the doctrine that a purchaser shall have that which he contracted for, or not be compelled to take that which he did not mean to have."(*i*)

§ **1183.** Accordingly where a wharf and jetty were contracted to be sold, and it turned out that the jetty was liable to be removed by the corporation of London, specific performance was refused.(*j*)[1] In the case of the sale of a residence and four acres of land, a slip of ground of about a quarter of an acre between the house and the high road, to which no title was made, was held not to be a subject for compensation.(*k*) And in case Lord Eldon thought that a defect in title in respect to eleven out of seventy acres, which do not appear to have been peculiar in their position or character "would probably be material to the suit."(*l*)

§ **1184.** In some cases a part of the estate contracted for may be material because, if any one else were to possess it, it would probably be turned to some purpose prejudicial to the enjoyment of the estate; as where land near a mansion was such that it would be most profitably used for building ground or for a brick-kiln. But the nuisance thus apprehended must be probable, and not merely distant, fanciful, and conjectural.(*m*)[2]

(*h*) Drewe v. Hanson, 6 Ves., 675; Halsey v. Grant, 13 Ves., 73; Stapylton v. Scott, 13 Ves., 425; Knatchbull v. Grueber, 3 Mer., 124. See also Howland v. Norris, 1 Cox, 59. The decision in Shirley v. Davis, to which Lord Eldon frequently alludes, appears to have been in fact the opposite of that which his Lordship stated. Shirley v. Stratton, 1 Bro. C. C., 440, n. (2).

(*i*) 3 Mer., 146. See, too, the judgments of the L. J. J. in Re Arnold, 14 Ch. D., 270.

(*j*) Peers v. Lambert, 7 Beav., 546.

(*k*) Perkins v. Ede, 16 Beav., 193.

(*l*) Osbaldsiton v. Askew, 2 J. & W., 539. Cf. Portman v. Mill, 2 Russ., 570, 574

(*m*) See per Plumer, V. C., in Knatchbull v. Grueber, 1 Mad., 167 (the case on appeal is reported 3 Mer. 124).

[1] *Deficiency essential to the enjoyment of the residue.*] Where the deficiency is so great that the remainder could not be enjoyed profitably, or where the deficiency is essential to the enjoyment of the residue, equity will not enforce specific performance against a purchaser. Howard v. Kimball, 65 N. C., 175; Philips v. Stanch, 20 Mich., 369.

[2] *Doctrine of compensation.*] Sir Thomas Plumer, V. C., said in Knatchbull

§ **1185**. Again where the tenure of an estate contracted to be sold is in fact altogether, or to a substantial extent, different from that which the vendor has represented himself to be selling, he will not be able to enforce performance, unless indeed the purchaser has waived the objection.

§ **1186**. Thus where, on a sale by auction, the particulars described the property to be sold as a "freehold estate with a leasehold adjoining," and it turned out that, of the seventy acres of which the estate consisted, sixty-two were leasehold and only eight freehold, Lord Alvanley, M. R., said that, if the purchaser had objected on that ground, he should have thought the purchase ought not to be carried into execution. As, however, the purchaser had not taken the objection, his lordship granted an injunction restraining an action for the deposit on the terms of the vendor bringing the money into court.(*n*)

§ **1187**. Again, where an estate is sold as tithe free, subject to a modus, and it is in fact subject to tithe, the court will not, as a general rule,(*o*) compel the purchaser to take it with compensation.(*p*)

§ **1188**. Nor, it seems, would the court compel a person who had contracted for the purchase of an estate free from incumbrances to take, instead of that, an estate subject to

(*n*) Fordyce v. Ford, 4 Bro. C. C., 494. Cf. Cox v. Coventon, 31 Beav., 378; and see Hughes v. Jones, 3 De G. F. & J., 307.

(*o*) See, however, infra, § 1199.

(*p*) Ker v. Clobury, St. Leon, Vend., 267; Binks v. Lord Rokeby, 2 Sw., 222. Lord Stanhope's case, cited 6 Ves., 678, is explained by Lord St. Leonards, Vend., 266

v. Grueber, 1 Mad., 153: "There is great difficulty of applying the doctrine of compensation to a reluctant purchaser. There is no standard by which to ascertain what is essential to a purchaser. The motives for purchasing real property are very different in different persons. Facts, opinions and ages create different views. Some particularity, some whim, may have induced him to purchase. What is desirable to one is not so to another. One wants a wood for game, another dislikes tithes. It therefore seems a little arbitrary to insist on a party taking compensation. Why am I bound to take what I did not mean to buy? You say you will give me compensation, but who is to judge of the compensation? Can you be sure it is a compensation? It is a difficult thing for a master to ascertain what is essential to the enjoyment of the estate, and what is a proper compensation. It is as difficult for the court to decide, if, having all the data before it, it decides, as it is then proper to do, without sending it to the master. Are you to look at the land in its present state, or to consider in what state it may be in future? It is said a purchaser should communicate his motives for purchasing. If so, the vendor might enhance the price. It is also said that the defendant's objection that these twelve acres are essential was an after thought. Suppose it was. Is a court of equity to say no advantage can be taken of the objection? Though a purchaser may not, at first, be aware of the essentiality of the land to which no title can be made, yet, if he afterwards finds it is essential, is a court of equity to say he shall not avail himself of the objection?" See, also, Foley v. Crow, 37 Md., 51; Shaw v. Vincent, 64 N. C., 690.

an incumbrance amounting to one half of the purchase-money ;(*q*) though if there is only a small incumbrance upon a considerable estate, the decision may, as will be shown, be otherwise.(*r*)

§ **1189**. In some cases the compensation to be made for a defect may take the form of an indemnity ; which is a species of compensation—inasmuch as something else is given in place of the very thing contracted for—applicable to cases where the defect or loss is not certain but contingent.

§ **1190**. The court will not, however, at a vendor's instance, compel the purchaser to take an indemnity, unless such indemnity was part of the contract between the parties.(*s*) Thus, where the sub-lessee of a house had contracted to grant a twenty-one years' lease of it to the defendant, but, owing to the house in question being, with five others, subject to the covenants and proviso for re-entry contained in the head lease, could not give the defendant a secure lease for the term of his contract, specific performance was refused, though the plaintiff offered to indemnify the defendant in case of his eviction.(*t*) Similarly it has been held that a purchaser could not be forced to take an indemnity in respect to a misdescription,(*u*) or of a possible liability under an ambiguous covenant.(*v*)

§ **1191**. In a case decided by Lord Hatherley (then Wood, V. C.,) in the year 1858, the contract was that the defendant should procure a lease then vested in his father to be surrendered to the plaintiff, and would thereupon accept a new lease from the plaintiff and pay a premium of £300 for it. The father refused to surrender his lease, whereupon the plaintiff filed her bill for specific performance, praying that, if the defendant could not obtain the surrender, he might be decreed to accept a lease commencing from the expiration of his father's lease, and in other respects in the terms of the contract, and also to make good her loss resulting from the non-performance of the contract. It was held on demurrer that the court could not

(*q*) Per Lord Eldon in Wood v. Bernal, 19 Ves , 221.
(*r*) See infra, § 1196 et seq
(*s*) See per Lord Eldon in Balmanno v. Lumley, 1 V. & B., 225, and cases cited infra, §§ 1245, 1246. See too Wood v. Bernal, 19 Ves , 221.
(*t*) Fildes v. Hooker, 3 Mad., 193.
(*u*) Ridgway v. Gray, 1 Mac. & G., 109.
(*v*) Nouaille v. Flight, 7 Beav., 521.

interfere to decree specific performance, but would leave the plaintiff to her remedy at common law in damages.(*w*)

§ **1192**. The principle of compensation will not be applied at the instance of a vendor who has been guilty of misrepresentation. This point will be illustrated hereafter.(*x*)

§ **1193**. Even where the circumstances are such that the vendor might originally have enforced the contract with compensation, he may lose his right to do so by subsequent conduct inconsistent with the contract—as for instance where, one of the terms of the contract being that immediate possession should be given, and the purchaser having taken possession accordingly, the vendor, on a question as to compensation arising, turned him out of possession.(*y*)

§ **1194**. (2) On the other hand, in each of the following cases the defect was considered a proper subject for compensation, but not so essential as to debar the vendor altogether from enforcing the contract:—where an estate of about 186 acres was described as freehold, and in fact about two acres, part of a park, were held only from year to year;(*z*) where there was an objection to the title of six acres out of a large estate, and those acres do not appear to have been material to the enjoyment of the rest;(*a*) where fourteen acres were sold as meadow, and only twelve answered that description;(*b*) and where, on a purchase by a tenant in possession, property described as forty-six feet in depth proved to be only thirty-three feet.(*c*)

§ **1195**. In one case where, on a sale of colliery works, the vendors had stated the annual profits of the concern at a sum largely in excess of the actual amount, they were nevertheless allowed to enforce the contract, but on the terms of making compensation to the purchasers by submitting to an abatement from the purchase-money, bearing the same proportion to the excess as the total purchase-money bore to the capitalised value of the amount of profits stated by the vendors.(*d*)

§ **1196**. On the general principle already stated,(*e*) the mere fact of the existence of some small or (to the pur-

(*w*) Beeston v. Stutely, 6 W. R., 206; 27 L. J. Ch., 156; see now infra, §§ 1265, 1270.
(*x*) Infra, § 1217 et seq.
(*y*) Knatchbull v. Grueber, 3 Mer., 124, 144, 147.
(*z*) Calcraft v. Roebuck, 1 Ves. Jun., 221.
(*a*) McQueen v. Farquhar, 11 Ves., 467.
(*b*) Scott v. Hanson, 1 R. & My., 128.
(*c*) King v. Wilson, 6 Beav., 124.
(*d*) Powell v. Elliot, L. R. 10 Ch., 424.

chaser) immaterial incumbrances on the property is not enough to deprive a vendor of his right to insist on the specific performance of the contract.

§ **1197**. Thus, where tithes contracted to be sold were subject to sundry small charges,(*f*) and where the estate sold was subject to quit-rents (which may be regarded as incidents of tenure,[*g*]) the court enforced the contracts, in one case with an inquiry whether there ought to be any and what indemnity in respect of the charge,(*h*) and in the others with compensation to the purchaser by way of abatement from the purchase-money.

§ **1198**. And in a case where an estate sold as fen land, and so described in the particular, was subject, under a local but public act, to certain embanking and drainage taxes which were not mentioned in the particulars, the court, on the ground apparently of the act imposing the charges being a public act, decreed against the purchaser specific performance of the contract without compensation.(*i*)

§ **1199**. Further, although, as we have seen,(*j*) a man who contracts to purchase an estate which is described as tithe-free will not generally be compelled to complete his purchases, if it turn out that the land is subject to tithe,—it being considered that, as a general rule, the right to the tithe is so material to the enjoyment of the land as to have formed the inducement to the purchase,—still, where the circumstances show that the right to the tithe is not thus material, the general rule ceases to apply. For instance, where an estate of about 140 acres was described as subject to tithe except thirty-two acres, and the exemption from tithe of those thirty-two acres was not proved,(*k*) and again where the circumstances showed that the question whether the land was to be tithe free or not was an immaterial one in the view of the purchaser;(*l*) the court compelled the purchaser to complete the contract with compensation.

§ **1200**. On the principle that a warranty or a represen-

(*e*) Supra, § 1178.

(*f*) Halsey v. Grant, 13 Ves., 73; Horniblow v. Shirley, 13 Ves., 81. Cf. Drewe v. Hanson, 6 Ves., 675.

(*g*) Esdaile v. Stephenson, 1 S. & S., 122, 124.

(*h*) Halsey v. Grant, ubi supra.

(*i*) Barraud v. Archer, 2 Sim., 433; affirmed on appeal (not reported: see 2 R. & My., 751).

(*j*) Supra, § 1187.

(*k*) Binks v. Lord Rokeby, 2 Sw., 222. In this case there appears to have been a condition that errors of description should not vitiate the sale. See 2 Sw., 225.

(*l*) Smith v. Tolcher, 4 Russ., 302.

tation is not binding, where in respect of some defect that is perfectly patent,(*m*) the court will not give a purchaser compensation for defects of this nature: so that a contract was enforced, at a vendor's instance, without any compensation in respect to the misdescription of a farm described as lying within a ring fence, which did not so lie, as the purchaser had himself seen and knew; while in the same case compensation was given for latent defects.(*n*)

§ **1201**. But in order that this principle shall apply, the defect must be perfectly visible to everybody: therefore, where a representation was made by a vendor as to the dry-rot in a house, which was not a matter so perfectly visible, the court gave compensation:(*o*) and where a tenant in possession purchased the property, which was represented as forty-six feet in depth, but was in fact only thirty-three feet, he was held entitled to compensation, inasmuch as occupiers are not in the habit of measuring their premises. (*p*)

§ **1202**. Moreover, if the purchaser, after he knows of a defect, acts in a manner implying a waiver of it, the vendor becomes entitled to insist on the completion of the purchase without compensation. Thus, where the abstract, delivered in January, showed part of the estate to be subject to a right of sporting, and in the following April the purchaser at his own request was let into possession, and afterward several letters passed between the parties, and most of the purchase-money was paid without any objection on the score of the right before, in October of the same year, the purchaser claimed compensation; it was held that he had waived the objection, and specific performance without compensation was decreed against him.(*q*)

§ **1203**. In an Irish case specific performance was enforced, at the vendor's instance, without compensation for a deficiency of nearly one-half in acreage of property described in the contract as "about 200 acres of mountain land," the land being a waste of heath of trifling value.(*r*)

(*m*) Supra, §§ 658, 659, 849. Cf. Horsfall v. Thomas, 31 L. J. Ex., 322; 10 W. R., 650.
(*n*) Dyer v. Hargrave, 10 Ves., 505.
(*o*) Grant v. Munt, Coop., 173.
(*p*) King v. Wilson, 6 Beav., 124.
(*q*) Burnell v. Brown, 1 J. & W., 168. Distinguish Hughes v. Jones, 3 De G. F. & J., 307.
(*r*) Corless v. Sparling, I. R. 9 Eq., 595.

1. (b) *Vendor insisting upon the contract, there being a condition for compensation.*

§ **1204**. In the cases now to be considered, while the general principles already stated are applicable, and the rights of the vendor are usually somewhat extended by the language of the particular condition, at the same time, conditions of sale being, as we have seen,(*s*) construed strictly against the vendor, it is incumbent upon him, if he rely upon the condition to compel the purchaser to carry the contract into execution, taking compensation for some defect, to show that the defect is of such a nature as properly to fall within the condition.(*t*)

§ **1205**. Quite apart from any consideration of fraud, where there is in a contract a misdescription "in a material and substantial point, so far affecting the subject-matter of the contract as that it may be reasonably supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation."(*u*)

§ **1206**. Thus, where the particulars of a leasehold house in Covent Garden stated that, by the lease, "no offensive trade was to be carried on, and that the premises could not be let to a coffee-house keeper or working hatter," and there was a condition for compensation in case of error or misstatement, and the original lease, in fact, prohibited a vast variety of other businesses than those described, including the sale of any provisions, the purchaser was held to be entitled to rescind the contract.(*v*)

§ **1207**. Again, where there was a condition for compensation in the case of error in the description of the premises, or of any other error whatsoever in the particulars, and the property which was described as copyhold turned out to be partly freehold, Lord Romilly, M. R., refused to compel specific performance by the purchaser: he had contracted to purchase one thing, and he might refuse to accept another.(*w*)

(*s*) Supra, § 1154 et seq.

(*t*) See per Lord Westbury in Cordingly v. Cheesebrough, 4 De G. F. & J., 384.

(*u*) Per Tindal, C. J., in Flight v. Booth, 1 Bing. N. C. 377.

(*v*) Flight v. Booth, 1 Bing. N. C., 370. Distinguish Grosvenor v. Green, 7 W. R., 140.

(*w*) Ayles v. Cox, 16 Beav., 23. In Hick v. Phillips, Prec. in Ch., 575, a bill by a vendor of an estate, which in the articles was treated as freehold, was refused because about one-sixth in value was copyhold, but nothing is stated as to the peculiar nature of the tenure. Cf. the observations of Romilly, M. R., in Hudson v. Cook, L. R. 13 Eq., 420. See too Evans v. Robins, 8 Jur. N. S., 846.

§ **1208**. In another case a yard, which was essential to the enjoyment of the property sold, was held from year to year, instead of for the term of twenty-three years for which the rest of the premises were held, and at a separate rent: this was considered to be a defect which the vendors were not entitled to bring within a condition for compensation for mistake in the description of the property or any other error whatsoever in the particulars.(*x*)

§ **1209**. In Madeley v. Booth(*y*) leasehold property was sold for the residue of a term of ninety-nine years, which commenced on the 24th of June, 1838, under conditions which prohibited the purchaser from calling for the lessor's title, and stipulated that any error or misstatement of the property, term of years, or other description, should not vitiate the sale, but that a compensation should be given: the term sold was really not the residue described, but a derivative term less by three days than the original one: Knight Bruce, V. C., held that the underlease was not substantially the same thing, the resulting rights being different, and accordingly dismissed with costs a bill by the vendor praying for specific performance with compensation. This decision, however, has been judicially disapproved of, and does not seem to be consonant with principle.(*z*)

§ **1210**. The principle under consideration of course applies where, though the whole land is conveyed, it, or a part of it, is subject to rights which materially affect its enjoyment: thus a right of way, which would render useless for building a close advertised as building-ground, has been held not to come within a condition for compensation ;(*a*) so grants of rights to the owners of lower lands, to fetch water from a spring on the upper lands, to cut and cleanse drains leading the water to the lower lands, and other similar rights having reference to four and a half acres out of about thirty sold, were held to constitute a material defect in the title to the upper lands, and consequently were not the subject of compensation, notwithstanding a condition that a mistake in the description or an

(*x*) Dobell v. Hutchinson, 3 A. & E., 355.
(*y*) 2 De G. & Sm., 718.
(*z*) See per Jessel, M. R., in Camberwell and South London Building Society v. Holloway, 13 Ch. D., 760, and infra, § 1215. See too Darlington v. Hamilton, Kay, 557, 558; and Hayford v. Criddle, 22 Beav., 477
(*a*) Dykes v. Blake, 4 Bing. N. C., 463.

error in the particulars should be the subject of compensation, and not annul the contract.(*b*)

§ **1211**. Generally, where there is a proper case for compensation, and the amount can be reasonably estimated, the court is disposed to grant it.(*c*)

§ **1212**. But where this reasonable estimate is not attainable, the court refuses to compel the purchaser to take compensation: thus, where a house and grounds were sold by the court, and, pending the making out of the title, some ornamental timber was cut down, the purchaser was discharged, because the act affected the value of the property to the purchaser, as a residence, in a way which the court was unable to measure.(*d*) And where the particulars represented the average size of the timber in the wood, which was the property sold, as approaching fifty feet, but in no way specified the number of the trees; and the witnesses for the plaintiff (the vendor) treated no trees containing less than ten feet as timber trees, and on this basis showed an average of thirty-four feet six inches; whilst the defendant's witnesses, reckoning all trees containing not less than five feet as timber trees, showed an average of twenty-two feet only; it was held by Lord Hatherley (then Wood V. C.) that the subject-matter sold fell short of the description; but, in the absence of any representation as to the number of trees, the court had no data for calculation, and therefore could not give compensation, but dismissed the bill.(*e*)

§ **1213**. The same principle seems to have governed another case, in which the premises were described as in the joint occupation of A. and B. as lessees, whereas they were in fact in their joint occupation, but not as lessees, but A. was the assignee from C., the original lessee: it was held that this was not a case for compensating the purchaser, but that he could not be forced to take an indemnity.(*f*)

§ **1214**. On the other hand, where the conditions provided that any misstatement of the quality, tenure, out-

(*b*) Shackleton v. Sutcliffe, 1 De G & Sm., 609. Cf. Nouaille v. Flight, 7 Beav., 521.
(*c*) See infra, § 1242.
(*d*) Magennis v. Fallon, 2 Moll., 561, 584. Cf. Cox. v. Coventon, 31 Beav., 378.
(*e*) Lord Brooke v Rounthwaite, 5 Ha., 298. Cf. infra, § 1261.
(*f*) Ridgway v. Gray, 1 Mac. & G., 109. Distinguish Farebrother v. Gibson, 1 De G. & J., 602.

goings, or other particulars of the property, described by an innocent mistake as "valuable freehold estate," should be the subject of compensation; and one lot was in fact of copyhold tenure, but it appeared that under a composition with the lord of the manor the difference in value between copyholds in that manor and freeholds was very slight; it was held that the vendor was entitled to compel the purchaser to take the lot in question with compensation.(*g*)

§ **1215**. Further, although, where a man sells a lease for a definite term of years, and nothing more is said on either side, he cannot make a good title unless he shows that it is an original lease, yet where the particulars and conditions of sale in effect tell the purchaser that the lease which is offered for sale is in fact an underlease, the vendor is entitled to enforce completion without compensation, and that notwithstanding a condition for compensation in the event of any error or mistake appearing in the description, or in the nature or quality of the vendor's interest therein, or in the particulars of the sale. For *per se* calling a thing a lease which is a lease is not a misdescription.(*h*)

§ **1216**. The cases where the defect is, from its magnitude or importance, not a proper subject for compensation, have been already stated. We may now consider some other cases, where the doctrine will not be applied.

§ **1217**. The principle of compensation, whether arising under the general doctrine of the court, or under a condition for compensation in case of any error or misstatement, will not be applied where there has been misrepresentation,(*i*) even, it seems, though the difference be of such a character that, if it had arisen from mere error, it would have been subject to compensation, as, for instance, in respect of the difference between copyholds nearly equal in value to freeholds and freeholds.(*j*)

§ **1218**. Thus where, on a sale by auction, one of the lots was described as to be sold with a reservoir and waterworks

(*g*) Price v. Macaulay, 2 De G. M. & G., 339

(*h*) Per Jessel M. R. in Cumberwell and South London Building Society v. Holloway, 13 Ch. D., 754, 761. Cf Darlington v Hamilton, Kay, 558; Hayford v. Criddle, 22 Beav., 477; Nouaille v. Flight, 7 Beav., 521; Henderson v. Hudson, 15 W. R., 860; Flood v. Pritchard, 40 L. T., 873; Turner v. Turner, W. N. 1881, 70.

(*i*) Per Plumber M. R. in Clermont v. Tasburgh, 1 J. & W., 119, 120;

Duke of Norfolk v. Worthy, 1 Camp., 337, 340; Powell v. Doubble, St. Leon. Vend., 23; Stewart v. Allston, 1 Mer. 26; supra, § 1164; and distinguish Powell v. Elliott, L. R. 10 Ch., 424.

(*j*) Price v. Macaulay, 2 De G. M. & G., 339, 344.

yielding a yearly rental of about £60, and it turned out that this rental arose from supplying with water from the reservoir some houses between which and the reservoir lay lands of other proprietors, through which the vendor had no right to carry the water except under a license from year to year for which he paid rent; it was held that the description contained such a misrepresentation as to debar the vendor from enforcing specific performance.(*k*)

§ **1219**. Representation as to the tenancy of a house, the court refused to hold the purchaser to his contract and make him take compensation for the delay which would have been needed for an ejectment, although the purchaser bought for investment, and not for residence.(*l*)

§ **1220**. Again, where the particulars of sale described a farm, which formed about one-third of the estate sold, as "lately in the occupation of A. at an annual rent of £290, 15*s*," and the facts were that A. had occupied the farm for a year and a quarter only, and then at the nominal rent of £3, for the first quarter, and that since his tenancy (which came to an end about sixteen months before the sale) the vendor had been willing to let the farm at £225, and knew that nothing like £290 a year could be obtained for it, the court held that such misrepresentation was not a matter for compensation, but entitled the purchaser to be discharged altogether from his purchase.(*m*)

§ **1221**. But it seems that a mere flourishing description in particulars, such as that land is fertile and improvable, whereas part of it has in fact been abandoned as useless, cannot, except as in extreme cases—as for instance where a considerable part is covered with water, or otherwise irreclaimable—be considered such a misrepresentation as to entitle a purchaser to be discharged.(*n*)

2. (a) *Purchaser insisting on the contract, there being no condition for compensation.*

§ **1222**. Although, as a general rule, where the vendor has not substantially the whole interest he has contracted

(*k*) S. C. See too Leyland v. Illingworth, 2 De G. F. & J., 248.
(*l*) Lachlan v. Reynolds, Kay, 52.
(*m*) Dimmock v. Hallett, L. R. 2 Ch., 21.
(*n*) S. C. 27 (per Turner, L. J. See too Johnson v. Smart, 2 Giff., 151 ("substantial and convenient" dwelling-house).

to sell, he, as we have seen, cannot enforce the contract against the purchaser, yet the purchaser can insist on having all that the vendor can convey, with a compensation for the difference (*o*)

§ **1223**. "If," said Lord Eldon,(*p*) "a man, having partial interests in an estate, chooses to enter into a contract, representing it, and agreeing to sell it, as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety; and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under those circumstances is bound by the assertion in his contract; and, if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement; and the court will not hear the objection by the vendor, that the purchaser cannot have the whole."(*q*)[1]

§ **1224**. The principle was acted on by Lord Nottingham, in the case of Cleaton v. Gower,(*r*) where the defendant Gower was tenant for life of certain estates in Shropshire, and he and his late father agreed with the plaintiff that the plaintiff should open and work certain mines, and should enjoy the minerals raised for ten years, if the defendant or his issue male should so long live, at a yearly rent of £25. The plaintiff sought a specific performance of this contract: the defendant objected that he was only tenant for life, and subject to account for waste, and that he could not execute the contract because it was inconsistent with his power: the court decreed the defendant to execute the contract so far as he was capable of doing it, and likewise to satisfy the plaintiff such damages as he had sustained in not enjoying the premises according to the contract.

§ **1225**. The principle is also well illustrated by Lord

(*o*) See e. g. per Turner, L. J., in Hughes v. Jones, 3 De G. F. & J., 315 The authority of James v. Lichfield, L. R. 9 Eq., seems at least questionable. Compare Phillips v. Miller, L. R. 9 C. P., 196, 10 C. P., 420, with Caballero v. Henty, L. R. 9 Ch., 447. See, however, Keays v. Carroll, I. R. 8 Eq., 97.

(*p*) In Mortlock v. Buller, 10 Ves., 315.

(*q*) See accordingly Attorney-General v. Day, 1 Ves. Sen., 224; Milligan v. Cooke, 16 Ves., 1; Dale v. Lister, 16 Ves., 7; Hill v. Buckley, 17 Ves., 394; Western v. Russell, 3 V. & B., 187; Neale v. Mackenzie, 1 Ke., 474; Bennett v. Fowler, 2 Beav., 302; Sutherland v. Briggs, 1 Ha., 26, particularly 34; Wilson v. Williams, 3 Jur. N. S., 810 (Wood V. C.); and cf. Dyas v. Cruise, 2 Jon. & L., 487.

(*r*) Finch, 164.

[1] Clark v. Reins, 12 Gratt., 98; Waters v. Travis, 9 John., 450; Herbers v. Gadsden, 6 Rich.'s Eq., 284; Voorhee v. De Myer, 3 Sandf.'s Ch., 614; Jacobs v. Locke, 2 Ired.'s Eq., 286; Erwin v. Myers, 46 Pa. St., 96; Mapier v. Darlington, 70 id., 64; Weatherford v. James, 2 Ala., 170.

Bolingbroke's case,(*s*) before Lord Thurlow. The incumbent of a living had contracted with a tenant in remainder for the purchase of the avowson, and on the faith of the contract had built a much better house on the glebe than he would otherwise have done: the tenant for life refusing to concur in the sale, Lord Thurlow compelled the tenant in remainder to convey a base fee for levying a fine, with a covenant to suffer a recovery on the death of the tenant for life.

§ **1226**. In Wheatley v. Slade(*t*) Shadwell, V. C., held the principle under discussion not to apply where a large part of the property could not be conveyed; and consequently, the contract in that case being for the sale of a lace manufactory, and it turning out that the vendors were only entitled to nine-sixteenths of the whole, and that those parts were subject to a debt which would exhaust nearly the whole of the purchase-money, he refused specific performance. The vice chancellor's decision appears to have been influenced by the circumstance that the vendors entered into the contract under a mistaken impression that they were possessed of the entirety of the property. But the case, even if it can thus or otherwise upon its own particular circumstances be supported, is not, it is submitted, likely now to be followed. For it will be shown that, though the difference between the property contracted to be sold and that which the vendor can actually convey may be great, the court will generally, notwithstanding this circumstance, enforce the contract where it sees that its intention is the sale of whatever interest the vendor has.

§ **1227**. Indeed the tendency of the court in recent years has been to apply the principle liberally. Thus where two vendors contracted to sell two-sixths of certain leaseholds "together with all other their rights and interests therein," and it turned out that they were only entitled to two twenty-first parts each, the purchaser was held entitled to specific performance of the contract to the extent of the vendors' interests, with a proportionate abatement of the purchase-money.(*u*)

(*s*) 1 Sch. & Lef., 19 n., quoted by Lord Cottenham in Great Western Railway Co. v. Birmingham and Oxford Junction Railway Co., 2 Ph., 605.

(*t*) 4 Sim., 126. See the observations of Lord St. Leonards on this case, Vend., 263; also Maw v. Topham, 49 Beav., 576, where the vendors were only entitled to three-fourths.

(*u*) Jones v. Evans, 17 L. J. Ch., 469. See too Leslie v. Crommelin, I. R. 2 Eq., 134.

§ **1228**. Again, where A., who had only an estate *per autre vie* in property, the remainder in fee belonging to his wife, contracted to sell the fee simple to B. (who was ignorant of the state of the title), and then got his wife to concur with him in conveying it to C. (who knew of B.'s contract), it was held that B. was entitled to have a conveyance from C. of A.'s interest, with compensation in respect of his wife's interest which he was unable to convey or bind without her consent.(*v*)

§ **1229**. So where vendors contracted to sell the entirety of certain freeholds, and it was afterwards discovered that they were entitled to an undivided moiety only, the purchaser obtained a decree for the specific performance of the contract by the vendors to the extent of their moiety, with an abatement from the purchase money of one-half the amount.(*w*)

§ **1230**. And so where A. and B. contracted to sell leasehold property to C., and on examining the title it appeared that A. was entitled to a moiety subject to a mortgage for its full value, and that B. had no interest at all—facts which were not known to C. at the time when he entered into the contract—C. was held entitled to an assignment of A.'s moiety, on the terms of covenanting to pay the rent and perform the covenants in the lease, and also to pay the mortgage-debt, and to indemnify A. in respect to those liabilities.(*x*)

§ **1231**. In each of the cases referred to in the last four sections, the purchaser was unaware, at the time when he entered into the contract, of the imperfection of the vendor's title.(*y*) But even if the purchaser has from the first been aware of the state of the title, that circumstance will not necessarily exclude him from the benefit of the principle under consideration.[1]

(*v*) Barnes v. Wood, L. R. 8 Eq., 424. Cf. Neithorpe v. Holgate, 1 Coll., 203.
(*w*) Hooper v. Smart, L. R. 18 Eq., 683.
(*x*) Horrocks v. Rigby, 9 Ch. D., 180.
(*y*) See supra, § 453 et seq.

[1] The law, as it now exists in this country, is stated by Mr. Justice Story. After considering the numerous conflicting cases on the subject, he says: "There is, however, a distinction upon this subject, which is entitled to consideration, and may, perhaps, reconcile the apparent diversity of judgment in some of the authorities. It is, that courts of equity ought not to entertain bills for compensation or damages, except as incidental to other relief, where the contract is of such a nature that an adequate remedy lies at law for such compensation or damages. But, where no such remedy lies at law, there a peculiar

§ **1232**. Thus, in a recent case, real estate stood limited by marriage settlement to such uses as A. and his wife should appoint, and in default of appointment to the use of the trustees of the settlement during the wife's life, in trust for her separate use, with remainder to A. in fee. A. agreed to sell the fee simple to C. by a contract in which the wife's interest was mentioned, but which went on to say that A. would procure a proper assurance to be executed by all proper parties; afterwards the purchaser actually paid over the purchase-money to the trustees, but the wife refused to convey her interest. Bacon, V. C., held that C. was entitled to have the purchase completed to the extent of A.'s reversion in fee, with compensation for the life interest of the wife and a lien on the fund in the hands of the trustees.(*z*) "If," said the Vice Chancellor, "a man enters into a con-

(*z*) Baker v. Cox, 4 Ch. D., 464 (cf. S. C. on demurrer, 3 Ch. D., 359). See too Wilson v. Williams, 3 Jur. N. S., 810. Cf. and distinguish Castle v. Wilkinson, L. R. 5 Ch., 535, infra, § 1236.

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ground for the interference of courts of equity seems to exist, in order to prevent irreparable mischief, or to avoid a fraudulent advantage being taken of the injured party. Thus, where there has been a part performance of a parol contract for the purchase of lands, and the vendor has since sold the same to a *bona fide* purchaser for a valuable consideration without notice; in such a case, inasmuch as a decree for a specific performance would be ineffectual, and the breach of the contract being by parol, would give no remedy at law for compensation or damages, there seems to be a just foundation for the exercise of equity jurisdiction." Eq. Jur., § 798. See the case of Robertson v. Hogsheads, 3 Leigh, 667. It has also been said, upon the highest authority, that where the vendor never had any title to the land contracted to be sold, or where he has conveyed the same subsequent to the making of the contract, so that he has not the power specifically to perform his contract, *and that the fact is known to the vendee*, the latter cannot file a bill in equity for the mere purpose of obtaining compensation in damages, for the non-performance of the contract by the vendor; but he must resort to his remedy at law for that purpose. But where the defendant deprives himself of the power to perform his contract specifically, *during the pendency of a suit* against him, to compel such performance, the court will retain the suit; and will award to the complainant a compensation in damages, for the non-performance of the contract by the defendant. The principle on which this is based is to prevent a multiplicity of suits. Besides, the plaintiff, who had a good cause of action when his bill was filed, ought not to be turned out of court, by the mere act of the defendant, without either the relief for which he originally filed his bill, or a compensation in lieu of it. But while a court of equity does not entertain jurisdiction where the sole object of the bill is to obtain a compensation for the breach of a contract, except when the contract is of equitable cognizance merely, it would seem that if the complainant filed his bill in good faith, supposing at the time he instituted his suit that a specific performance could be granted, and *not knowing* that the defendant had previously parted with the title, the bill may be retained for compensation. Walworth, Ch., Moss v. Elmendorf, 11 Paige, 277; Hatch v. Cobb, 4 John.'s Ch., 559. Kent, Ch., Kimpshall v. Stone, 5 id., 193; Woodward v. Harris, 2 Barb.'s Sup. Ct. R., 439; Willard's Eq. Jur., 291; see Wiswall v. McGowan, 1 Hoff.'s Ch., 125.

tract to sell something, representing that he has the entire interest in it, or the means of conveying the entire interest, and receives the price of it and does not perform his contract, then the other party to the contract, who has parted with his money or is ready to pay his money, is entitled to be placed in the same position he would be in if the contract had been completed; or if not, by compensation to be placed in the same position in which he would be entitled to stand."(*a*)

§ **1233**. It is obvious that, in thus proceeding, the court is executing the contract *cy près*, or rather perhaps is carrying into execution a new contract,(*b*) a course in which difficulties sometimes arise which put restrictions on the application of the principle under discussion. These have now to be considered.

§ **1234**. The principle will not, it seems, be applied where the alienation of the partial interest of the vendor might prejudice the rights of third persons interested in the estate. Thus where a tenant for life without impeachment of waste under a strict settlement had contracted for the sale of the fee, the court refused to compel him to alienate his life interest, on the ground that a stranger would be likely to use his liberty to commit waste in a manner different from a father, and more prejudical to the rights of those in remainder.(*c*)

§ **1235**. If the purchaser is, from the first, aware of the vendor's incapacity to convey the whole of what he contracts for, he cannot, generally, insist on having, at an abated price, what the vendor can convey.(*d*)

§ **1236**. Thus where a husband and wife signed a contract for the sale of the wife's fee simple estate to the plaintiff, who knew from the plain language of the contract the true state of the title, it was held that, as the plaintiff clearly never could have believed for a moment that the husband could sell the fee simple, he was not entitled to have a conveyance of all the husband's interest, *i. e.* his estate for the joint lives of himself and his wife and his

(*a*) 4 Ch. D., 469.
(*b*) See per Lord Langdale, M.R., in Thomas v. Dering, 1 Ke., 746.
(*c*) Thomas v. Dering, 1 Ke., 729. Cf. supra § 388 et seq
(*d*) Cf. supra, § 1231.

estate by curtesy with an abatement of the purchase-money; and the bill was accordingly dismissed.(*e*)

§ **1237**. Similarly where vendors were entitled only to three-fourths of the property, and the purchaser was at the time he filed his bill aware, or had good reason to believe, that no good title could be made to the whole of the premises, Lord Romilly, M. R., held that, though he might probably have recovered damages, yet, as he chose to file a bill for specific performance, he was not entitled to any abatement from the purchase-money, but that he might take without abatement the three-quarters which the vendors could convey.(*f*) And it has been decided that where a person has dealt with a tenant for life for a certain lease, being at the time aware that it would be in excess of the tenant for life's power, and so endeavoring to put a fraud upon the settlement, he will not afterwards be allowed to call for a lease from the tenant for life to the extent of his interest: the contract was not at the time it was entered into a fair and proper one, and the court therefore would not interfere.(*g*)

§ **1238**. In the case of Edward Wood v. Marjoribanks,(*h*) the purchaser of an advowson discovered, after accepting the title, that the benefice was subject to a mortgage to Queen Anne's bounty which he might have discovered before: there had been no misrepresentation or willful concealment on the part of the vendors: on bill filed by the purchaser for specific performance with compensation, Stuart, V. C., decreed specific performance, but without compensation, and ordered the purchaser to pay the costs of the suit; and this decision was affirmed by Knight Bruce and Turner, L. J. J.

§ **1239**. Where there is a defect in the quantity of the estate, the principal on which the abatement is calculated is *primâ facie* acreage. But where woodland was sold as so many acres, and the wood as having been valued at so much,

(*e*) Castle v. Wilkinson, L. R. 5 Ch., 535. Cf. and distinguish Hooper v. Smart, L. R., 18 Eq., 683, supra, § 1229; Barker v. Cox, 4 Ch. D., 464, supra, 1232. See too Keayes v. Carroll. I. R. 8 Eq., 97; Fairhead v. Southee, 11 W. R., 739.

(*f*) Maw v. Topham, 19 Beav., 576. Lord St. Leonards appears to doubt this decision, Vend., 257; and it certainly seems difficult to reconcile it with some of the more recent cases already cited supra, § 1227 et seq.

(*g*) O'Rourke v. Percival, 2 Ball & B., 58.

(*h*) 1 Giff., 384; 3 De G. & J., 329; 7 H. L. C., 806.

the abatement was for so much as the soil covered with wood would be worth without the wood.(*i*)

§ **1240**. Where the difference in value of the interest contracted for and the interest that can actually be conveyed is incapable of computation, the court will not, indeed cannot, enforce specific performance.(*j*) But having regard to some of the decided cases already referred to,(*k*) it is conceived that the court will seldom now consider a difficulty of this kind insuperable.

§ **1241**. In one case what was contracted to be sold was an absolute and indefensible estate in fee, and it turned out that the vendors held under a crown grant, containing various reservations and conditions with a proviso for re-entry on breach of condition. The court considered that the proper amount of compensation was not estimable, but held that the purchaser was not bound to take the property without compensation, and therefore was entitled to the payment with interest of a part of the purchase-money that he had paid, and to a lien on the estate for the amount.(*l*)

§ **1242**. Although, where there are no data from which the amount of compensation can be ascertained, the court cannot enforce the contract with compensation,(*m*) the objection that the compensation is unascertainable is, as has been already in substance observed, one which the court is unwilling to entertain; and it grants relief with compensation in many cases in which the ascertainment of the amount to be paid cannot be said to be certain or exact, but only the reasonable estimate from the evidence of competent persons; as, for instance, where compensation was granted for the existence in a stranger of the right to dig coals in the lands sold.(*n*)[1]

(*i*) Hill v. Buckley, 17 Ves., 394. See too McKenzie v. Hesketh, 7 Ch. D 675, where the rent was reduced proportionately to the deficiency of acreage, and Powell v. Elliott, L. R. 10 Ch., 424, 430.

(*j*) See supra, § 1212, infra, § 1248, and Collier v. Jenkins, You., 295, where bill by purchaser's heir for specific performance with compensation for an outstanding lease for life was dismissed by Lord Lyndhurst (then) C. B Cf. Thomas v. Dering, 1 Ke., 729; Graham v. Oliver, 3 Beav , 124.

(*k*) See supra, § 1227 et seq

(*l*) Westmacott v. Robins, 4 De G. F. & J., 390.

(*m*) See infra, § 1212

(*n*) Ramsden v Hirst, 4 Jur. N. S., 200. Cf. Powell v. Elliot, L. R. 10 Ch., 424.

[1] *Rule as to compensation.*] In order that a party be entitled to compensation, the defect complained of must be—1st. Such that it can be made the subject of compensation or of recompense in damages 2d. It must be a case in which the court is satisfied that the purchaser would not have declined the contract had he known the defect at the time of the purchase. Byer v. Marks, 2 Sweeney, 715. Spencer, J., said in this case: 1st. A purchaser may insist

§ **1243**. Again it may, it is conceived, be laid down generally that, wherever the court sees that the enforcement of the contract with compensation would be unjust or unfair, or would disappoint the reasonable expectation of the parties, there it refuses to take such a course.[1]

§ **1244**. Thus, where an estate which really contained only 11,814 acres was, by a *bonâ fide* mistake of the vendor's agent, described in the contract as containing 21,750 acres, and it appeared that the vendor had accepted the price on a computation of the rental of the estate, Lord Romilly, M. R., considered that to force him to sell the estate for little more than half the price contracted for would be a hardship, and that the case was one of mistake; and he accordingly held that the purchaser might, at his option, either take the actual quantity at the contract price or have the contract rescinded, but that he was not entitled to specific performance with an abatement for the deficiency of acerage.(*o*)

§ **1245**. A purchaser cannot insist on the vendor per-

(*o*) Earl of Durham v Legard, 34 Beav., 611. Cf. the remarks of Lord Abinger, C. J., in Price v. North, 2 Y. & C. Ex., 626, and Colyer v. Clay, 7 Beav., 188; and distinguish Hill v. Buckley, 17 Ves., 394 (supra, § 1239), and McKenzie v. Hesketh, 7 Ch. D., 675.

upon a good, valid and unincumbered title. 2d. He is entitled to receive substantially, from his vendor, all the property for which he contracted. 3d. If he obtains such a title, and, by the conveyance offered, obtains substantially the property for which he contracted, a court of equity will enforce performance on his part, otherwise not. These general rules are not, in my opinion, modified or affected by those relating to compensation, which the court will enforce, in all proper cases, in favor of the purchaser against the vendor, when specific performance has been or shall be decreed; as, for instance, in the case of a slight or immaterial deficiency in the estate, a variance of description, or an incumbrance affecting the title. The doctrine of compensation, as a rule of equity, follows these and like cases, in order to pay the purchaser for those slight defects that in equity he may be entitled to, if in equity he should be compelled to fulfill the contract of purchase; and, in such cases, compensation follows as a matter of right, and I hold must be provided for in the decree." See, also, Cann v. Cann, 3 Sim., 530; King v. Bardean, 6 John.'s Ch., 38; Morss v. Elmendorf, 11 Paige's Ch., 277; Powell v. Elliott, L. R., 10 Ch., 424; Lee v. Home, 27 Mo., 521; Hepburn v. Auld, 5 Cranch, 262; Hebers v. Gadsden, 6 Rich.'s Eq., 284; Stockton v. Union Oil Co., 4 W. Va., 273; Bell v. Thompson, 38 Ala., 633; Smith v. Fly, 24 Tex., 345; Scott v. Bilgerry, 40 Miss., 119. Where there is a pecuniary charge against an estate which is amply protected by an adequate security, equity will compel a vendee to receive the title in such a case. Halsey v. Grant, 13 Ves., 75; Horniblow v. Shirley, 13 id., 181; Fildes v. Hooker, 3 Mad., 193; Thompson v. Carpenter, 4 Pa. St., 132.

[1] Where A. purchased of B. 686 acres of land for cultivation, and the vendor's title to 209 acres thereof was found defective, it was held that the vendee should not be compelled to take the residue, although it lay distinct and separated from the other portion by a public road. Jackson v. Ligon, 2 Leigh, 161; see Bryan v. Read, 1 Dev. & Bat.'s Ch., 78; Read v. Noe, 9 Yerg. 285.

forming the contract, giving an indemnity against a defect, unless the indemnity was contracted for.(*p*)

§ **1246**. In Bainbridge v. Kinnaird,(*q*) a vendor (since deceased) had contracted to sell to the plaintiff a property which was, in common with other estates, subject to a charge of £15,000 raisable for the benefit of the vendor's sisters. Lord Romilly, M. R., held that the plaintiff might have a simple decree for specific performance against the trust devisees of the vendor, but was not entitled either to compensation in respect of the charge or to an indemnity against it.

§ **1247**. Within what limit of time after the conclusion of the contract a claim for compensation must, if made at all, be made, is a question that may obviously in many cases be important.

§ **1248**. There is, it is conceived, no doubt that the court will enforce compensation, at any time before the completion of the transaction by the execution of the conveyance and the payment of all the purchase-money, in respect of any matter, the fit subject of compensation, which has arisen before that time, and whether before or after the conclusion of the contract. Thus, where an estate was sold as tithe free, and, after a claim had been started by the incumbent of one parish, the conveyance was executed, but a part of the purchase-money was set aside as an indemnity against this claim: the claim came to nothing, but, before the indemnity fund was transferred, it appeared that the land was in another parish, and was subject to tithe to its incumbent: it was held, on a bill filed by the purchaser, that he was entitled to compensation in respect of these tithes out of the fund.(*r*)

§ **1249**. And on the same principle the court will allow compensation for deterioration which may have occurred in the value of the estate, between the time when the contract ought to have been completed by the vendor, and the time when he does in fact make out the title,(*s*) whether it have arisen by the willful default or merely by the negligence of

(*p*) Balmanno v. Lumley, 1 V. & B., 224; per Lord Eldon in Paton v. Brebner, 1 Bli., 66; Aylett v. Ashton, 1 My. & Cr., 105; cf. supra, § 1190.

(*q*) 32 Beav., 346.

(*r*) Crompton v. Lord Melbourne, 5 Sim., 353. Cf. (under the old practice) Cator v. Earl of Pembroke, 1 Bro. C. C., 301; 2 Bro. C. C., 282; Frank v. Basnett, 2 My. & K., 618; Phelps v. Paothero, 7 De G. M. & G., 722.

(*s*) Binks v. Lord Rokeby, 2 Sw., 222.

the vendor or his tenants.(*t*) Thus, where stone had been subtracted from a quarry pending a suit for specific performance of a contract to grant a license to work it, compensation was obtained by means of a supplemental bill.(*u*)

§ **1250**. Whether, after conveyance has been executed and purchase-money paid, the court still has jurisdiction to enforce compensation, is a question on which there has been some conflict of judicial opinion.(*v*) It is submitted that rights to compensation under the contract may exist even after the conveyance and payment have been executed and made; and further that, whenever such rights exist, they may now be asserted in the same action as that in which specific performance is claimed. Where the contract gives no right to compensation the case is, of course, different.(*w*)

2. (b) *Purchaser insisting on the contract, there being a condition for compensation.*

§ **1251**. The language of the condition must of course have an important effect on the subject for compensation under any particular contract, and in every case serves at least to indicate the nature of the matters in respect of which, and the circumstances under which, both parties intended that the purchaser should have a right to compensation. But the purchaser is not, it is conceived, bound to show that the subject-matter of his claim is of a kind expressly embraced by the words of the condition: except in so far as there may be anything in the contract excluding his claim, or empowering the vendor to defeat it—which are matters to be determined according to the ordinary rules of construction(*x*)—he is entitled not merely to the right expressly given to him by the condition, but to the full measure of relief applicable to the case according to the general principles already discussed: in other words, his right to compensation under the condition is generally cumulative to a purchaser's ordinary right to it: but he must, of course, submit to the corresponding limitations of the general principles.

(*t*) Foster v. Deacon, 3 Mad., 394. Cf. per Lord Eldon in Binks v. Lord Rokeby, 2 Sw., 226.

(*u*) Nelson v. Bridges, 2 Beav., 239. On the question of deterioration see further infra, Part V. chap. v. § 1404 et seq.

(*v*) Compare the cases cited in §§ 1252, 1253, infra.

(*w*) Consider Brett v. Clowser, 5 C. P. D., 376.

(*x*) Consider the observations of Lord Westbury in Cordingley v. Cheeseborough, 4 De G. F. & J., 384.

§ **1252**. In accordance with a principle already stated,(*y*) it has been held, in cases decided before and also since the passing of the judicature acts, that a condition for compensation may be enforced notwithstanding that the conveyance has been executed. In Cann v. Cann,(*z*) Shadwell, V. C., decided that a right of the purchaser to receive compensation, under such a condition, for a misstatement (discovered after possession taken) in the particulars as to the value of the property was not at all affected by the circumstances of his having paid the whole purchase-money into court and taken a conveyance. Subsequently the court of exchequer unanimously adopted the same view :(*a*) and the jurisdiction has again been emphatically asserted, upon a full consideration of the authorities, by Jessel, M. R., in a case in which his lordship held a purchaser entitled to the benefit of a condition for compensation, in respect of a deficiency of acreage discovered by measurement after the execution of the conveyance.(*b*)

§ **1253**. On the other hand, in a case where the land sold was described as "available" for a building site for a warehouse, and after the completion of the purchase the purchaser discovered that under the land ran a culvert (not mentioned in the particulars) with which he could not interfere, Malins, V. C., held that, there being no question of fraud, the purchaser could not after conveyance have the benefit of a condition for compensation in respect of errors or misstatements :(*c*) and his lordship subsequently expressed his deliberate adherence to this view.(*d*)

§ **1254**. The decisions referred to in the last preceding section appear to be irreconcilable with the authorities previously cited. It is suggested that if a vendor wishes to preclude the possibility of controversy on the point, he may effectually do so by simply inserting in the contract words to the effect that compensation shall be taken and given

(*y*) Supra, § 1250; and cf. per Hall, V. C., in Jones v. Clifford, 3 Ch. D., 779, 792.

(*z*) 3 Sim., 447. Cf. Horner v. Williams, 1 Jones & C., 274.

(*a*) In Bos v. Helsham, L. R. 2 Ex., 72.

(*b*) Re Turner and Skelton, 13 Ch. D., 130. See too Phelps v. White, 5 L. R. Jr., 318, where the purchaser was held entitled to compensation, though he had means of discovering the error before completion; and distinguish Brett v. Clowser, 5 C. P. D., 376.

(*c*) Manson v. Thacker, 7 Ch. D., 620. Cf. Brett v. Clowser, 5 C. P. D., 376.

(*d*) Besley v. Besley, 9 Ch. D., 103; Allen v. Richardson, 13 Ch. D., 524, 541, where the Vice Chancellor expressly dissented from Re Turner and Skelton, 13 Ch. D., 524, considering that the doctrine of caveat emptor applies to such cases. Consider Browlie v. Campbell, 5 App. C., 925, 936; Leuty v. Hillas, 6 W. R. 51, 2 De G. & J., 110.

only for errors or other things discovered before the completion of the purchase.

§ **1255**. In consonance with the general principles on which the court deals with conditions of sale,(*e*) its tendency is to put a liberal and comprehensive construction upon conditions giving compensation to a purchaser, and a strict one upon any which limit his right to it.

§ **1256**. Thus, where by an innocent mistake the particular described part of the estate as customary leasehold renewable every twenty-one years, whereas in fact there was no such custom to renew; the fourth condition of sale empowered the vendor to vacate the sale upon objection taken to the title, and another condition stipulated that if, through any mistake, the estate should be improperly described, or any error or misstatement should not vitiate the sale, but the vendor or purchaser should pay or allow compensation for it; Lord Hatherley (then Wood, V. C.,) held that the misstatement fell within the condition for compensation, and further that it was not an objection to title, within the meaning of the fourth condition, enabling the vendor to vacate the sale.(*f*)

§ **1257**. And where land was described in the particulars as containing 753 square yards, whereas it actually contained only 573 square yards, and one of the conditions provided that if any error, misstatement, or omission in the particulars should be discovered, the same should not annul the sale, nor should any compensation be allowed by the vendor or purchaser in respect thereof, it was held by Malins, V. C., that such a condition must be construed as intended to cover small unintentional errors and inaccuracies, but not to cover reckless and careless statements, and that so large a deficiency as 180 square yards out of 753 did not come within the condition; and that the purchaser was therefore entitled to compensation.(*g*)

§ **1258**. Where, however, the conditions stipulated that (1) the admeasurements should be presumed to be correct, but if any error were discovered therein, no allowance should be made or required either way; (2) if any error of

(*e*) See Part V. chap. i. § 1153 et seq.; and per Lord Westbury in Cordingley v. Cheeseborough, 4 De G. F. & J., 381 et seq.

(*f*) Painter v. Newby, 11 Ha., 26.

(*g*) Whitemore v. Whitemore, L. R., 8 Eq., 603. Cf. Portman v. Mill, 2 Russ., 570. 574.

any kind were made in the description of the premises such error should not invalidate the sale, but a fair compensation should be given or taken; and (3) if the purchaser should make any objection as to compensation or otherwise which the vendor should be unwilling to remove or comply with, the vendor should be at liberty to vacate the sale: and the area of the property, stated in the particulars to 7,683 square yards, was found by the purchaser upon actual admeasurement to be only 4,350 square yards: and the vendor before suit offered to vacate the contract, but the purchaser refused the offer and insisted upon the performance of the contract with compensation for the deficiency: Lord Westbury held that the right of the purchaser must be determined by the operation of the conditions read in connection with one another, and that, though the court probably would not, at the vendor's instance, have enforced the condition as to erroneous admeasurement where the error was so great, the purchaser could not, in the face of that condition, have an allowance for the deficiency of area.(*h*)[1]

§ **1259**. It has also been decided that where the conditions, while providing that, if any mistake appear to have been made in the description of the property or the vendor's interest therein, it shall not annul the sale, but shall be the subject of compensation, at the same time provide that, if any objection is persisted in, the vendor may rescind the contract, then, if the purchaser persists in a claim for compensation which really involves an objection to the title, the vendor may rescind the contract, and, if he does, the court will not afterwards give the purchaser any relief in respect of the condition for compensation.(*i*)

§ **1260**. Another illustration of the principle that a purchaser's right to claim compensation may be abrogated, notwithstanding a condition for compensation, by the

(*h*) Cordingley v. Cheeseborough, 4 De G. F. & J., 379, affirming S. C. 3 Giff., 496. affirmed L. R. 6 Ch., 91. And see Cordingley v. Cheeseborough, 4 De G. F. & J., 379.

(*i*) Mawson v. Fletcher, L. R. 10 Eq., 212,

[1] See Hepburn v. Auld, 5 Cranch, 262, and Foley v. McKeon, 4 Leigh, 627, where a lot was advertised for sale at auction as containing nearly two acres. At the sale, the auctioneer stated that there were nearly two acres, and pointed out the boundaries—the sale was in gross: and there was in reality but one acre and twelve poles. Held, that the deficiency should not avoid the sale.

operation of another term of the contract, is afforded by the case of Williams v. Edwards.(*j*) There A. had contracted to sell to B. certain freehold property, and the contract contained a stipulation that errors in the description of the premises should not vacate contract, but a reasonable abatement or equivalent should be made or given, but it was also stipulated that, if B.'s counsel should be of opinion that a marketable title could not be made at the time appointed for the completion of the purchase, the contract should be void and be delivered up to be cancelled; and B.'s counsel was of opinion that a good title could be made only to two-thirds, and that one-third was held for a life only: the purchaser insisted on specific performance with compensation; but it was refused, because the contract was by its special terms void under the circumstances.

§ **1261**. In a case which came before the House of Lords, the particulars stated that the fines in the manor of T., which was the subject-matter of the sale, were arbitrary, and also that the clear profits of the manor for the last eight years had averaged £150 a year; and one of the conditions of sale provided for compensation being given for errors and misstatements. It turned out that by the custom of the manor only one class of fines was arbitrary; but that the clear profits of the manor exceeded £200 a year. The lordships refused to give the purchaser compensation for the misstatement as to the fines, considering that, reading the statements in the particulars as a whole, there had been no substantial misrepresentation: but it was intimated in the speeches of Lord Brougham and Lord Cottenham(*k*) that, if the misstatement as to the fines had been a substantial one, the impossibility of computing the proper amount of compensation would have prevented its being given.(*l*)

§ **1262**. Damages may be said to be a species of compensation, inasmuch as they are awarded in order to make good to the purchaser some loss or expense which he has suffered or been put to in connection with the contract, but

(*j*) 2 Sim., 78. See per Lord Westbury in Cordingley v. Cheeseborough, 4 De G. F. & J., 385; and cf. Hudson v. Buck, 7 Ch. D., 683, 687.

(*k*) White v. Cuddon, 8 Cl & F., 786, 792.

(*l*) White v. Cuddon, 8 Cl. & F., 766. See supra, §§ 1212, 1240 et seq.

they are so distinct a form of relief that they may most conveniently be discussed in a separate chapter.(*m*)[1]

(*m*) See infra, Part V. chap. III. § 1263 et seq.

[1] Small and trifling incumbrances on land are generally disregarded Winne v. Reynolds, 6 Paige, 407; Ten Broeck v. Livingston, 1 John.'s Ch., 357. But, although both quit-rents, and entire rent charges, are subjects of compensation (Esdaile v. Stephenson, 1 S. & St, 124; Horniblow v. Shirley, 13 Ves., 83; Halsey v. Grant, id., 80), yet, where the charge is only a portion of a rent charge issuing out of an entire estate, the vendee will not be compelled to accept compensation, or to complete the contract, unless the vendor can procure a certain appointment of the charge (Barnewell v. Harris, 1 Taunt., 431), provided the purchaser did not become such under a clear understanding that he was to be exonerated in a specified and different mode; if that were the case, he cannot insist upon a better indemnity than that agreed upon, although it may not be an absolutely perfect exoneration. Casmajor v. Strode, 2 Swanst., 356. Miller v. Chetwood, 1 Green's Ch., 199, affords an example of the stringency of the rule. In that case it was held, that, on a bill by the vendor for a specific performance of a contract for the sale of a certain tract of land, although the quantity of the tract is not stated in the contract, the defendant may show by parol evidence that the complainant, before the sale, represented to the defendant that the tract contained nine acres, when, in fact, it contained only about six. And, it was further said, it makes no difference in such a case, that the sale was made by the tract and not by the acre, and that the vendee lived in the neighborhood of the ground, subject daily to his observation, for this constitutes no excuse for the misrepresentations of the vendor. Upon these grounds specific performance was refused. In a case where it would be difficult to ascertain the injury resulting from a breach of contract, or the sum in damages by which the injury might be compensated, the Supreme Court of the United States have decided that they will not themselves ascertain the injury, nor direct an issue of *quantum domnificatus*. Pratt v. Law, 9 Cranch, 456; Pratt v. Campbell, 2 Pet., 354.

CHAPTER III.

OF DAMAGES.

§ **1263**. In early times, the Court of Chancery did not entirely disclaim jurisdiction in respect of damages, where they were incident to the subject-matter already in contention before the court.(*a*) Subsequently the jurisdiction was disowned, and a broad distinction set up between compensation and damages, the extent and measure of the one being regarded as different from that of the other, so that (to follow the illustration given by Lord Eldon) if A. contracted to sell B. an estate tithe free, and B. contracted to sell it to C. on the same conditions, and it was found that A. could not convey tithe free, he might be compelled by the court to make compensation for the difference in the value of the property, but not for the damage sustained by B. from being unable to complete his contract with C.(*b*)

§ **1264**. However, in a case which came before the lords justices in the year 1855, the jurisdiction of the Court of Chancery to award damages for the want of a literal performance of a contract which it had directed to be specifically performed was re-asserted. "It is the constant course of the court," said Turner, L. J., "in the case of the vendor and purchaser, where a sufficient case is made for the purpose, to make an inquiry as to the deterioration of the estate, and in so doing, the court is, in truth, giving damages to the purchaser for the loss sustained by the contract not having been literally performed."(*c*)

§ **1265**. In the year 1858 an express power of awarding damages in cases of specific performances was conferred upon the Court of Chancery by the chancery amendment act of that year(*d*) (commonly called Lord Cairns' act), whereby it was enacted (section 2) that, in all cases in which the Court of Chancery then had jurisdiction to entertain an

(*a*) Cleaton v. Gower, Finch, 164; City of London v. Nash, 3 Atk., 512, where Lord Hardwicke refused specific performance, but relieved by way of damages, to be ascertained by an issue of quantum damnificatus.

(*b*) Per Lord Eldon in Todd v. Gee, 17 Ves., 278; Jenkins v. Parkinson, 2 My. & K., 5

(*c*) In Prothero v. Phelps, 7 De G. M. & G., 734.

application for the specific performance of any contract, it should be lawful for the same court, if it should think fit, to award damages to the party injured either in addition or in substitution for such specific performance ; and that such damages might be assessed in such manner as the court should direct.

It is to be noticed that the jurisdiction given by this enactment is a discretionary one, and enables the court to deprive a suitor of what would otherwise be in his right to specific performance.

§ **1266**. It was—as indeed the language of the second section of Lord Cairns' act clearly shows—a condition precedent to the Court of Chancery's awarding damages under that act that the plaintiff should show himself to have been entitled, at the time when he commenced his suit, to some equitable relief of the nature specified in that section. Accordingly where a plaintiff prayed for the performance of an alleged contract by a company to allot shares to him, and also, if all the shares had been allotted to other persons, for damages, and it appeared that all the shares had been allotted before the filing of the bill, it was held that, specific performance having from the first been impossible, the claim for damages also failed.(*e*)

§ **1267**. In a case decided by Lord Hatherley (when Wood, V. C.), the contract was that the defendant should grant a lease of a paper mill to M.; that M. should pay £122 for sundry articles on the premises, and should execute sundry improvements ; and that, if the defendant should fail to grant a valid lease, he would repay the £122 and all outlay on improvements. M. paid the £122 and expended about £5,000 on the premises ; but afterwards, on investigation of the title, it appeared that the defendant could not grant a valid lease according to the contract. Upon bill filed by M. for specific performance, or, if the defendant could not grant a valid lease, for repayment of M.'s outlay and damages, it was argued for the defendant that there could be no specific performance of the contract to grant a lease, that the alternative contract to repay outlay was not a sub-

(*d*) 21 & 22 Vict., c. 27

(*e*) Ferguson v. Wilson, L. R. 2 Ch., 77. Compare Howe v. Hunt, 31 Beav., 420, and Hilton v. Tipper, 16 W. R., 888, with Franklinski v. Ball, 33 Beav., 560. See, also, Lewers v. Earl of Shaftesbury, L. R. 7 Eq , 270; Scott v. Rayment, L R. 7 Eq., 112; Rogers v. Challis, 27 Beav , 175; and Middleton v. Magnay, 2 H. & M., 236.

ject for specific performance, and that damages would not be given where specific performance was impossible. But these arguments were repelled by the judge, who said, "There is an implied contract in every case between vendor and purchaser, that the purchaser shall have a lien on the property to the extent of the purchase-money he has paid, and here there is an express stipulation that the money expended shall be repaid. This right will sustain a claim for damages just as much as the right to specific performance of a contract to grant a lease which has dropped by reason of the impossibility of performance."(*f*)

§ **1268**. In a case decided in the year 1866, where, after specific performance of a contract had been decreed, certain facts occurred from which it was alleged that damage had arisen to the plaintiffs, Kindersley, V. C., held that the Court of Chancery had, under Lord Cairns' act, no jurisdiction to make after decree, on motion in the cause, an order for assessing damages; inasmuch as such an order would in effect be a supplemental decree founded on what had occurred since the decree was made.(*g*)

§ **1269**. Now, however, the jurisdiction conferred upon the Court of Chancery by Lord Cairns' act,(*h*) and also all the powers of granting damages which before the passing of the judicature acts were exercisable by the common law courts, are by virtue of the judicature act, 1873 (sections 16, 76), vested in the high court of justice; and by the last mentioned act it is expressly enacted (section 24) (7) that the high court and court of appeal, in the exercise of their respective jurisdictions, in every cause or matter pending before them respectively shall grant, either absolutely or on such reasonable terms as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to, in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concering any of such matters avoided.

(*f*) Middleton v. Magnay, 2 H. & M., 237.
(*g*) Corporation of Hythe v. East, L. R. 1 Eq., 620. As to granting damages after judgment, upon defendant's default, see supra, Part IV. chap. iv. § 1142.
(*h*) See Fritz v. Hobson, 14 Ch. D., 542.

§ **1270**. The court therefore can now give damages in any of the following cases, viz.:—

(1) In substitution for specific performance where there is a case for specific performance—under Lord Cairns' act.

(2) Where there is no case for specific performance—under the judicature acts.(*i*)

(3) In addition to specific performance in whole or in part—under Lord Cairns' act, and probably also under the judicature acts.

§ **1271**. Notwithstanding the judicature acts, the observance of the condition mentioned in a previous section(*j*) is still obligatory upon the court in the exercise of its discretionary jurisdiction under Lord Cairns' act; and damages in addition to or in substitution for specific performance will be given by virtue of that jurisdiction only when the plaintiff had a case for specific performance at the time when he issued his writ.(*k*)

§ **1272**. The court's jurisdiction in damages is an apt and flexible instrument for doing exact justice under the diverse and complicated circumstances of many of the cases upon which the court has from time to time to adjudicate.

§ **1273**. For instance, where the plaintiff contracted with the defendant to take a lease of property belonging to the latter, for the purpose, as he knew, of carrying on a business which the plaintiff intended to carry on there, and, owing to the defendant's willful refusal to perform his part of the contract, the plaintiff was for fifteen weeks unable to commence his business; the court, in addition to giving judgment for the specific performance of the contract, awarded £250 to the plaintiff by way of damages, in respect of his loss of profits during the fifteen weeks.(*l*)

§ **1274**. Where the plaintiff was at the time when he filed his bill entitled to specific performance, and also to damages for injury occasioned to him by the defendants' delay of performance, and before the suit could be brought to a hearing the defendants performed the contract; it was held that the plaintiff was nevertheless justified in bringing his suit to a hearing for damages.(*m*)

(*i*) See infra, § 1278.
(*j*) Supra, § 1266.
(*k*) White v. Boby, 26 W. R., 133.
(*l*) Jaques v. Miller, 6 Ch. D., 153; S. C. (No. 2), 26 W. R., 368; Wesley v. Walker, 26 W. R., 368. Consider Hyam v. Terry, 25 Sol. Jo., 371.
(*m*) Cory v. The Thames Iron Works and Shipbuilding Co., 11 W. R., 589; cf. S. S. (in Q. B.) 3 L. R. Q. B., 181.

§ **1275**. Sometimes the court can best do justice by enforcing the specific performance of one part of the contract and awarding damages for breach of the remainder. Where, for instance, a man contracted to pull down an old house, to rebuild, and to accept a lease of the new building, and then made default in rebuilding, Lord Hatherley (then Wood, V. C.,) held the intended lessor entitled to have damages for the non-building, and also specific performance of the contract to accept a lease.(*n*)

§ **1276**. Again it may well happen that, though the court has jurisdiction to enforce the specific performance of a contract, the justice of the case will be better met by awarding damages in substitution. Thus where a railway company contracted with a landowner to "erect, set up and construct a station," on land which they had bought from him, but the contract contained no further description of the station, and no stipulation as to the user of it when erected; and the company afterwards refused to erect a station on the agreed site; the court of appeal in chancery, considering that it could not satisfactorily do justice by means of a decree for specific performance, directed that the damage sustained by the landowner by reason of the non-performance of the contract should be ascertained (by an inquiry in chambers) and the amount paid to him by the company.(*o*)

§ **1277**. It may happen that a purchaser finds himself unable to obtain specific performance of a contract owing to some fatal defect in his vendor's title, which was unknown to him (the purchaser) at the time when he had entered into the contract. In such a case damages are the only possible form of relief; and the vendor will not be allowed to escape from liability to pay them by purporting to rescind the contract under a condition entitling the vendor to rescind in the event of the purchaser making any objection or requisition in respect of the title which the vendor is unwilling to comply with: for such a condition does not apply to a case where the vendor has not any title at all.(*p*)

§ **1278**. Where an action is brought for specific per-

(*n*) Soames v. Edge, Johns., 669, followed in Mayor and Corporation of London v. Southgate, 17 W. R., 197. Distinguish Norris v. Jackson, 1 J. & H., 319; and see Samuda v. Lawford, 4 Giff., 42.

(*o*) Wilson v. Northampton and Banbury Junction Railway Co., L. R. 9 Ch., 279.

(*p*) Bowman v. Hyland, 8 Ch. D., 588, 590; cf. Oakeley v. Ramsay, 27 L. T., 745. See too supra, Part III. chap. XXIV. § 1028 et seq.

formance, and specific performance is refused on the sole ground of a mistake by the defendant, the court will now consider the question of damages, and give the same damages as would, under the old practice, have been given in an action at law.(*q*)

§ **1279**. Where there was a case for damages, the Court of Chancery sometimes directed an issue to ascertain the amount.(*r*) The more usual course was to direct an inquiry, in chambers as to the sum to be awarded or allowed: and this is still commonly done.(*s*) In some recent cases, however, the damages have been assessed by the judge himself at the trial, and, where the plaintiff has not been ready with his evidence as to the amount of damages, the trial has been adjourned to give time for it to be obtained. It seems clearly desirable that the assessment of damages should, wherever practicable, take place at the trial, without any separate inquiry: for otherwise the parties are virtually put to the expense of two trials of the same question.(*t*)[1]

(*q*) Per James and Cotton, L. J. J., in Tamplin v. James, 15 Ch. D., 222, 223.

(*r*) e. g. Corey v. The Thames Iron Works and Shipbuilding Co., 11 W. R., 589; S. C. (in Q. B.) L. R. 3 Q. B., 181. Cf. Nelson v. Bridges, 2 Beav., 239, and Ferguson v. Tadman, 1 Sim., 530; also Ord. XXVI. and Ord. XXXVI. rr. 26, 27.

(*s*) See Seton, 1285. As to the costs of such an inquiry, cf. Slack v. Midland Railway Co., 16 Ch. D., 81.

(*t*) Jaques v. Millar, 6 Ch. D., 153; Wesley v. Walker, 26 W. R., 368; Seton, 1319.

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[1] *Agreement to rescind contract, resting in parol only.*] Where the agreement to rescind a contract rests only in parol, such rescission must be proved by acts which can leave no doubt of the intent. There must be a cancelling of the contract, or a removal from the possession, or some act which will make the intent positive. Where the agreement is unexecuted, it must be clearly proved, and must be founded on a new consideration. Lauer v. See, 42 Pa. S., 165; Pratt v. Morrow, 45 Mo., 404; Washington v. McGee, 7 T. B. Monr., 131; Phelps v. Seely, 22 Gratt., 573.

Example of insufficient proof of rescission of the sale of real property.] For an instructive case, see Pipkin v. Allen, 24 Mo., 520.

Contract rescinded, both parties must consent to renew.] A contract had been rescinded. Held, that it could not be renewed without the mutual consent of both parties. Lassen v. Mitchell, 41 Ill., 101.

Two parcels of land purchased; rescission, if at all, must be as to both.] A contract was entered into for the purchase of two parcels of land for a definite sum; one was conveyed at the time and the other was to be when both were paid for. Held, that it was an entire purchase, notwithstanding two-thirds of the purchase price was to be applied to one of the parcels, and that if there was a rescission at all it must be as to both parcels. Fay v. Oliver, 20 Vt., 118.

What will amount to an abandonment of an agreement?] An intention to rescind a contract of sale may be shown by circumstances, or it may be shown by such a course of action as establishes clearly that such was the intention of the party. Wheeden v. Fiske, 50 N. H., 125; Green v. Wells, 2 Cal., 584.

What will constitute an abandonment?] Whenever either party so conducts himself that his conduct can be viewed in no other light than that of a relinquishment of the contract, it will be regarded as rescinded. Any act by any of the parties which of necessity prevents the performance of the mutual agree-

ment will constitute an abandonment. Suber v. Pullin, 1 S. C. (N. S.), 273; Wright v. Haskell, 45 Mo., 489; see, also, Tibbatts v. Tibbatts, 6 McLean, 80. Where the vendor sold the land to a third person, this was held to be a rescission of the contract of sale. Little v. Thurston, 58 Me., 86; Warren v. Richmond, 53 Ill., 52. Where ejectment was brought to recover the land in possession of the vendee under a parol contract of sale, this was held to be a rescission of the contract. Hairston v. Jandson, 42 Miss., 380. Where the written contract of sale was surrendered, and such act was followed by acts which were inconsistent with its continuance, this was held to be a rescission. Crane v. De Camp, 21 N. J. Eq , 414.

When application of rescission not a rescission?] A party applied for the rescission of a contract and requested the other party to rescind it. Held, that such application did not amount to a rescission, and that it did not imply any breach or abandonment on the part of the applicant. Picot v. Douglass, 46 Mo., 497.

Mere contract of agency.] A railroad corporation employed a party to obtain donations and right of way for an extension of the road; he was to be allowed a large proportion of the amount received for his services Held, that such contract might be revoked whenever the company saw fit. The following is an extract from the opinion. *Per curiam:* "We can regard the relations between the defendant and the plaintiff, created by the instrument, in no other right than that of principal and agent. It is a familiar principle at law, that an agency is revocable at the will of the principal, unless the power conferred on the agent be given for a valuable consideration, or as a security, or is coupled with an interest. It is not claimed that the authority conferred upon the plaintiff was based upon a consideration, or was given as a security. Is it a power coupled with an interest? What was the interest of plaintiff? It was to receive a certain compensation in value and kind of the donations he should receive for defendant. His interest existed in that which should be produced by the exercise of the power conferred upon him. Now, it is plain that the thing in which he had, or rather was to have, an interest could not exist until the power was exercised The exercise of the power was necessary to bring the thing in which he was to have an interest into existence. In each instance, where a donation was given, the power was exhausted when the donation was received. Hence, the power and the interest were not united. The interest, coupled with a power which gives it an irrevocable character, must be in the thing upon which the power is exercised, and not in that which may be produced by the exercise of the power. Before the exercise of the power conferred by the instrument in question, nothing did or could exist in which plaintiff had an interest. He had a right to a part of the donations which he should procure. He had no interest in a thing, but a right to a thing when it should be created. His power, therefore, was not coupled with an interest, and was revocable at the will of the defendants." Smith v. Cedar Falls and Minn. R. R. Co., 30 Iowa, 244.

One party refusing to execute a substantial part of the contract.] Where one party to an agreement refuses to execute any substantial part of his contract by that act he gives the other party to the mutual agreement the option to rescind the entire contract by offering to restore what he has received and replacing the parties in their original position. This is true, provided the offer is made within a reasonable time, and the parties can be placed in their original position; the offer must, however, be made distinctly and unequivocally. Webb v. Stone, 24 N. H , 282; Allen v. Webb, 24 id., 278; Sumner v. Parker, 36 id., 449; Fay v. Oliver, 20 Vt., 118; Fletcher v. Cole, 23 id., 114.

Application to rescind must be made without delay.] Where a party asks for the rescission of a contract deliberately entered into, he must make his election with all due promptness. Lowber v. Selden, 11 How. Pr., 526; Lawrence v. Dale, 3 John.'s Ch., 23, 41; Wheaton v. Boker, 14 Barb., 594; Bruce v. Davenport, 3 Keyes, 474; Tobey v. Crown, 37 Md., 51; Hunter v. Daniel, 4 Hare, 420.

Agreement to rescind at future time; waiver.] There was an agreement that if certain acts were not performed at a future day that the contract might be rescinded. Held, that either party might, if so disposed, stand with the con-

sent of the other, either express or implied, upon the terms of the original contract; he may waive whatever advantages he has under the agreement of waiver. Echols v. Butler, 28 Miss., 114.

Example of fraud discovered too late to rescind.] A purchaser discovered fraud in his contract and raised no objection; afterwards he found other evidence of fraud and did so. Held, that he was too late to rescind the contract. Patterson, J., said: "To entitle him to do so he should, at the time of discovering the fraud, have elected to repudiate the whole transaction. Instead of doing so, he deals with that for which he now says that he never legally contracted. Long after this, as he alleges, he discovers a new incident in the fraud. This can only be considered as strengthening the evidence of the original fraud, and it cannot revive the right of repudiation which has been once waived" Campbell v. Fleming, 1 A. & E., 40.

Reference to determine the amount of damages.] A reference is usually made to a master, or commissioner, to ascertain the amount of damages in an action for specific performance. Where a reference has been ordered, the money should be brought into court. Stevenson v. Jackson, 40 Mich., 702. Where it is proper that a jury should assess the damages, the court may either order an assessment, or remit the parties to an action at law. Milkman v. Ordway, 106 Mass., 232. The contract could not be specifically enforced, for the reason that "it was not mutual, fair, just and reasonable in all its parts;" the plaintiff had been deprived of the benefit of the contract by the defendant's fraud. Held, that the money paid should be returned with interest, and this was done without ordering an issue *quantum damnificatus*. Rider v. Gray, 10 Md., 282; See, also, Pratt v. Law, 9 Cranch, 494.

Rule as to measure of damages in specific performance.] Where the title has failed, without the fault of the vendor, the proper measure of damages is the purchase price, together with legal interest. Luckett v. Williamson, 37 Mo., 368. In a case where the vendor has refused, or put it out of his power to make title, the measure of damages is the difference in the value of the estate at the time the agreement ought to have been completed, and what was to have been paid, if that value exceeds the price mentioned in the agreement. Dustin v. Newcomer, 8 Ohio, 49; Hall v. Delaplaine, 5 Wis., 206. Clayton, P. J., said in Burk v. Senill, 80 Pa. St, 413: "The law regulating the damages to be recovered, makes a distinction between the cases where there is a fraudulent breach of contract and those where the breach is occasioned by some unforeseen and unavoidable obstacle. As where one covenants to convey a good title, and it is afterwards discovered that he does not possess, and by no means in his power can procure, such a title, or the wife of the covenanter, without any collusion, persuasion or request, on his part, refuses to join in the deed. In cases of this kind, when the covenanter does all in his power to fulfill his contract, and, without any fault of his, cannot perform it, the damages to be recovered against him are only such actual and immediate losses as he may have suffered, such as the money paid with interest thereon, the time lost and expenses incurred in examining the title, conveyancing expenses, and such work or improvements as he may have made upon the land upon the faith of the contract. But where there is a wanton or dishonest refusal to perform the contract, or where the covenanter, by some fraudulent act on his part, renders the performance impossible—as where, by collusion with his wife, or by request on his part, she refuses to sign the deed, or where her refusal is not her own free and uncontrolled act, but made at the implied or actual request of her husband—the law, in such a case, awards full compensatory damages, and permits a recovery for all the party has lost by reason of the default of the other party, including the value of the bargain, and all injury and damage he may have suffered by reason of any act of his made upon the faith of the broken covenant." Hoar, J., said in Woodbury v. Luddy, 14 Allen, 1: "The plaintiff seeks the aid of a court of equity, to compel the specific performance of the defendant's contract to convey land. The defendant is unable to make a perfect title, and the court, at the plaintiff's election, will compel the conveyance of so much as the defendant can convey, and will award compensation in the nature of damages for the deficiency. The defendant has not undertaken to apportion the contract. If he was sued at law, the whole market value of

the estate would be the measure of damage. But dividing the estate may very much increase the proportionate damages, without any corresponding advantage to the defendant. By making the election, the plaintiff undertakes to receive what the defendant never agreed to give, namely, a partial conveyance of the estate; and equity will only allow this on the condition that the defendant shall not thereby be subjected to unreasonable injury. The plaintiff, in effect, elects to take satisfaction, partly in land and partly in money; and if he is allowed to do this, he should only, in equity be allowed to receive the fair money value of the part of the estate which is not conveyed to him. In the adjudged cases, though this is sometimes called damages, it is more usually spoken of as an equitable compensation for the value of that which the defendant does not convey. It is not always proper to estimate the value of the deficiency, at the average price per acre. The true inquiry should be, how much more was agreed to be paid by reason of the supposed additional quantity? Wilcoxon v. Calloway, 67 N. C., 463. Where the estate is of uniform value, the price agreed upon to be paid per acre, would, of course, furnish a proper measure of damages in a case of excess or deficiency. King v. Hamilton, 4 Pet., 311 Where the vendor, in an executory contract for the sale of land, fails to make title without fraud or bad faith, but through an inability which was not known to him at the time of contracting, he is liable for nominal damages only. 2 Wm. Black., 1078; Conger v. Weaver, 20 N. Y., 140. Where the vendee insists on a conveyance of a part, he must pay to the vendor the value of such part proportioned to the price which was to have been paid for the whole. Jacobs v. Locke, 2 Ired.'s Eq., 286; Chandler v. Geraly, 5 S. C., 501; see, however, Stockton v Union Oil and Coal Co., 4 W. Va., 273.

Rule as to damages in equitable actions.] Where the claim is solely for damages, whether for breach of the contract or for fraud in making it, and it is not sought to rescind it altogether, the party is, as a general rule, confined to his action at law; but a bill to have the contract rescinded for fraud, and for the recovery of damages, lies, though it does not ask for a discovery. Compensation in damages in an action for specific performance, is an incident merely. Unless, in very specific cases, chancery takes no cognizance of suits for damages only, founded on contract. Hatch v. Cobb, 4 John.'s Ch., 559; Kempshall v. Stone, 5 id., 193; Moss v. Elmendorf, 11 Paige's Ch., 279; Lynch v. Willard, 6 John.'s Ch., 342; Mayne v. Griswold, 3 Sand., 463; Newham v. May, 13 Price, 732; Sims v. McEwen, 27 Ala., 184; Doan v. Mauzey, 33 id., 227; Welch v. Bayard, 21 N. J. Ex., 168; Harrison v. Deramus, 33 Ala., 463; Richmond v. Dubuque R. R. Co., 33 Iowa, 422; Carroll v. Wilson, 22 Ark., 32; Stevenson v. Buxton, 37 Barb., 13; Horn v. Luddington, 32 Wis., 73. "It must be under very special circumstances and upon peculiar equities, as, for instance, in cases of fraud, or in cases where the party has disabled himself by matters *ex post facto* from a specific performance, or in cases where there is no adequate remedy at law." Story's Eq. Jur., § 790; see, also, Peler v. Levy, 26 N. J. Eq., 360; Izard v. May's Landing Power Co., 31 id., 511; Gumpton v. Gumpton, 47 Mo., 37. "We think the doctrine on this subject is now well-settled, and may be succintly stated to be this. Where the court of chancery has jurisdiction of the case, and where it is a case proper for specific performance, it may, as auxillary to specific performance, decree compensation or damages. And where the ascertainment of damages is essential in order to do complete justice between the parties in the case before it, the court ought not to send the parties to another forum to litigate their rights, but should refer the matter to one of its own commissioners, or direct an issue *quantum damnificatus* to be tried at its owu bar." Christian, J., Nagle v. Newton, 22 Gratt., 814; see, also, Prothero v. Phelps, 35 Eng. Law and Eq., 523; Masson's App., 70 Pa. St., 26; Bell v. Thompson, 34 Ala., 633; Holland v. Anderson, 38 Mo., 55; Woodman v. Freeman, 25 Me., 531; American Land Co. v. Grady, 33 Ark., 550; Hopkins v. Gilm., 22 Wis., 476.

An action cannot be brought in equity, solely for damages.] Where the vendee files his bill for a specific performance, knowing that the vendor has disabled himself from performing, it will not be retained to give him a compensation in damages. Such an action is matter strictly of legal, and not of equitable jurisdiction. Hatch v. Cobb, 4 John.'s Ch., 559; Kempshall v. Stone, 5 id., 193; Morrs v. Elmendorf, 11 Paige, 277; Doan v. Manzey, 33 Ill., 227; McQueen v.

Chouteau, 20 Mo., 222; Henty v. Schroder, L. R., 12 Ch. D., 666; Lewis v. Yale, 4 Fla., 437; Barnett v. Mendenhall, 42 Iowa, 296; Smith v. Kelly, 56 Me , 64; Frany v. Orton, 75 Ill., 100.

Where specific performance cannot be performed.] "The rule assumes, of course, a sufficient contract, performance, or an offer to perform, by the plaintiff, and every other element requisite on his part to the cognizance of his case in chancery; and that the special relief sought is defeated, not by any defense or counter equities, but simply because an order therefor would be fruitless from the inability of the defendant to comply. The jurisdiction is fixed by establishing the equitable right of the plaintiff. Relief must then be given by a decree in the alternative, awarding damages, unless the defendant should secure the specific performance sought. In many cases this would be an effective and proper course, insomuch as the defendant, although not having himself, at the time, the title or capacity requisite for such performance, might be able to procure it otherwise. The jurisdiction is not lost when the court, instead of such alternative decree, determines to proceed directly to an award of damages or compensation. The peculiar province of a court of chancery, is to adopt its remedies to the circumstances of each case as developed by the trial. It is acting within that province, when it administers a remedy in damages merely in favor of a plaintiff who fails of other equitable relief to which he is entitled, without fault on his part. The diversity of practice, in this respect, and the doubt as to the jurisdiction, we think must have arisen less from the nature of the relief to be afforded, than from the character of the means for determining the amount of compensation to be rendered." Wells, J., in Milkman v. Ordway, 106 Mass., 232; Wiswall v. McGowan, Hoff. Ch., 125; Woodcock v. Bennett, 1 Cow., 71; Hall v. Delaplaine, 5 Wis., 206; Holland v. Anderson, 38 Mo., 55; Chartier v. Marshall, 56 N. H., 478; Hamilton v. Hamilton, 59 Mo., 232.

CHAPTER IV.

OF REFERENCE OF TITLE.

§ **1280**. Where the vendor of land sues the purchaser for a specific performance of the contract, the defendant may, in some cases, succeed in having the action dismissed at the trial, on the ground of a defect in the plaintiff's title, provided the defect in title has been prominently put forward in the pleadings:(*a*) but where this is not the case, the defendant is entitled to have an inquiry directed as to the title of the vendor to the lands in question. This right is derived from the extraordinary nature of the jurisdiction which the vendor seeks to put in action, in consideration of which the purchaser has a right, not only to have such a title as the vendor offers upon the abstract unauthenticated, but the highest assurance upon the nature of his title which can be acquired for him by the production of deeds, the directing of inquiries, and the sifting of the vendor's conscience.(*b*)[1]

Hence it follows that, though the purchaser may admit that he has only one particular objection,(*c*) or no objection at all(*d*) to the title, he is equally entitled to a general reference as to it.

§ **1281**. Still whenever, in a judgment decreeing the specific performance of a contract, an inquiry whether the vendor can make a good title is directed in general terms, it

(*a*) Lucas v. James, 7 Ha., 418. 425.
(*b*) Jenkins v. Hiles, 6 Ves., 646, 653.
(*c*) Lesturgeon v. Martin, 3 My. & K., 255.
(*d*) Jenkins v. Hiles, 6 Ves., 646; cf. Fleetwood v. Green, 15 Ves., 594.

[1] *Part performance; vendee may insist upon.*] Where the vendor cannot fully perform, the vendee has a right to insist upon part performance with equitable compensation. Barns v. Wood, L. R., 8 Eq., 421; Wright v. Young, 6 Wis., 127; Jones v. Shackelford, 2 Bibb., 410; Matthews v. Patterson, 2 How. (Miss.), 729; McConnell v. Brillhart, 17 Ill., 354; Bass v. Gilliland, 5 Ala., 759; Collins v. Smith, 1 Head (Tenn.), 251; Harding v. Parshall, 56 Ill., 219; Wilson v. Cox, 50 Miss., 133. The vendor contracted to sell land, to which it was afterwards ascertained he had only the ownership of an undiminished half. Held, in an action to recover possession, or a decree for the purchase money, that the vendee might elect to take the half and pay one-half the purchase price, or that the contract should be rescinded, and the vendor to receive back the money paid and compensation for improvements, and, if any waste had been committed, damages should be deducted. Erwin v. Myers, 46 Pa. St., 96.

must be understood to mean a good title according to the terms of the contract: but if the vendor wishes to prevent the renewal, under the inquiry, of objections waived before the action, he should guard himself by establishing such waiver at the trial, and taking care that the judgment expressly recognizes it: for under a general inquiry as to title the court will not enter into any question of such waiver.(*e*)

§ **1282**. However, where a purchaser allowed the vendor's suit for specific performance to proceed to the point of the inquiry as to title, before bringing forward an objection which was patent on the face of the abstract originally delivered, he was not allowed his costs of the inquiry, though the objection was fatal to the title.(*e*)

§ **1283**. The right to the reference is so far that of the purchaser that the vendor cannot except to the title, so as to assert his own title to be bad.(*f*)

§ **1284**. The purchaser is also entitled to a reference of title where he is plaintiff in an action for specific performance; but inasmuch as in this case it is he, and not the vendor, who is calling on the court to act, he does so at his own risk; and therefore, if he knows of objections and asks for a reference, and then waives the objections, he will have to bear the costs of investigating the title.(*g*) And it would seem that the same result must follow where the effect of a reference is to show that the vendor had at the due time disclosed to the purchaser a perfect title.(*h*)

§ **1285**. The right to this reference is not confined to sales of real estate, but extends to any species of property with regard to which the court may entertain an action for specific performance, and the nature of which renders such an inquiry proper. Accordingly, inquiries have been directed into the title of vendors to shares in railway companies,(*i*) and in mining concerns.(*j*) The nature of the inquiry, of course, varies according to the nature of the property, and the essentials of a good title to it.

§ **1286**. But there are necessarily many contracts in

(*e*) Upperton v. Nickelson, L. R. 6 Ch., 437; Curling v. Austie, 2 Dr. & Sm., 129; McMurray v. Spicer, L. R. 5 Eq., 527. Cf. Corless v. Sparling, I. R. 8 Eq., 335.

(*f*) Bradley v. Munton, 15 Beav., 460.

(*g*) Bennett v. Fowler, 2 Beav., 302. Cf. Freme v. Wright, 4 Mad., 364.

(*h*) See Lyle v. Earl of Yarborough, John., 70.

(*i*) Shaw v. Fisher, 2 De G. & Sm., 11.

(*j*) Curling v. Flight, 2 Ph., 613.

respect of which no such inquiry is or can be made. Where the contract is not for the sale of any property, such a reference is of course out of the question. And so, too, where a contract is rather in the nature of a compromise of disputed rights than of a contract for sale, the court will not make the inquiry.(*k*) In a case where a small piece of land was described as held of certain commissioners of waste lands at a rent of six shillings, it was doubted whether a purchaser could call on a vendor for the title of the commissioners.(*l*)

§ **1287**. The court will not direct an inquiry where, though the contract be one of sale, the vendor only sells such interest as he has:(*m*) such a contract is, of course, perfectly valid, but, being in restraint of the purchaser's implied right to a good title, it must be made clear and unambiguous to the purchaser.(*n*) A vendor may, of course, stipulate that a purchaser shall take such title as he himself bought with.(*o*)

§ **1288**. Of such restrictive stipulations there are many cases: thus where a purchaser agreed to accept the vendor's title without dispute, he was held to be debarred from taking an objection on account of an incumbrance which left the legal estate outstanding.(*p*)[1] So, again, where conditions of sale of a free-farm rent stated that no evidence

(*k*) Godson v. Turner, 15 Beav., 46.
(*l*) Ashton v. Wood, 3 Jur. N. S., 1164 (Stuart, V. C.).
(*m*) See supra, § 857.
(*n*) Southby v. Hutt, 2 My. & Cr., 207, 212. See, also, Anderson v. Higgins, 1 Jon. & L., 718.
(*o*) Monro v. Taylor, 8 Ha., 51, 71.
(*p*) Duke v. Barnett, 2 Coll., 337; Wilmot v. Wilkinson, 6 B. & C., 506.

[1] *Contracts only partially in restraint of trade.*] Such contracts are sometimes enforced in equity. Tallis v. Tallis, 18 Eng. Law and Eq., 151; Pierce v. Woodward, 6 Pick., 206; Chappell v. Brockway, 21 Wend., 158; Mott v. Mott, 11 Barb., 127; Hoysland v. Segar, 28 N. J. Eq., 230; Dwight v. Hamilton, 113 Mass., 175; Roller v. Ott, 14 Kan., 600; Brown v. Rounsevall, 78 Ill., 589; Peltz v. Eichele, 62 Mo., 171; Oregon Steam Nav. Co. v. Windsor, 20 Wall., 64; Noah v. Webb, 1 Edw. Ch., 603.

Contracts to erect public buildings in a given locality sustained.] Specific performance will be decreed of a contract to pay money toward the erection of public buildings, provided the same are erected at a given locality, or are not removed therefrom. Carpenter v. Mather, 3 Scam., 374; State Treas. v. Cross, 9 Vt., 289; Bull v. Talcott, 2 Root, 119; Comm'rs of Canal Fund v. Perry, 5 Ohio, 56; Cauldwell v. Harrison, 11 Ala., 755; University of Vermont v. Buell, 2 Vt., 48; Religious Society v. Stone, 7 Johns., 112; McAuley v. Billinger, 20 John., 89; Collier v. Baptist Educat. Society, 8 B. Mon., 68; Trustees of Amherst Acad. v. Cowles, 6 Pick., 427; Williams Col. v. Danforth, 12 Pick., 541; George v. Harris, 4 N. H., 533; Odineal v. Barry, 24 Miss., 1; State v. Johnson, 52 Ind., 197; *contra*, Comm'rs v. Jones, Breese, 237; Stilson v. Comm'rs of Lawrence Co., 52 Ind., 213.

should be required of the receipt, or payment, or existence of the ground-rent, other than that disclosed by a conveyance mentioned, and that no objection should be taken to the title in consequence of the non-payment or non-receipt of the said rent, and the purchaser objected that the rent had not been paid for twenty years, and so was extinguished, and that there was therefore no subject-matter of the contract, and therefore no contract; the court held that the purchaser had by the contract taken on himself the chance of being able to substantiate his claim to the rent.(*q*)

§ **1289**. The case of Best v. Hamand(*r*) is a remarkable instance of the upholding of such a stipulation. There, the subject-matter of the contract being land which the vendor had bought from a railway company as superfluous land, the contract contained a stipulation that the purchaser should assume and admit that everything (if anything were necessary) was done and performed by the company to enable them to sell and effectually convey the land as surplus land, and should not call for or require production of any evidence to that effect. The vendor all along knew (as appeared from the abstract and replies to requisitions) that the statutory offer of pre-emption had not been made to the adjoining owners; but the court of appeal neverthless held that the purchaser was bound by the stipulation;—to the extent, at any rate, that his refusal to abide by the stipulation was a breach of the contract which disentitled him to sue for the repayment of his deposit. Unless the decision may be limited in this way, it seems difficult to reconcile it altogether with the principles laid down by the same court in the almost contemporaneous case of Re Banister(*s*) already referred to.

§ **1290**. Where the vendor was entitled to one undivided third in a leasehold interest in certain collieries, and the purchaser to another undivided third under the same title, and the contract was for an assignment of the vendor's share and not of the land, and the vendor was held not liable to show the lessor's title.(*t*)

§ **1291**. The vendor may generally by express stipulation, as we have seen, entirely exclude any inquiry into his

(*q*) Hanks v. Palling, 6 El. & Bl., 659; cf. Smith v. Harrison, 26 L. J. Ch., 412, 5 W. R., 408, stated supra. § 374.

(*r*) 12 Ch. D., 1.

(*s*) 12 Ch. D., 131; supra, § 1166.

(*t*) Phipps v. Child, 3 Drew., 709.

title. But he will not be allowed to fall back upon such a stipulation in support of a misleading condition of a sale ;(*u*) and where, the contract containing such a stipulation, the purchaser at first under a mistake common to both parties accepted the title, but on discovering the mistake objected to complete, it was held that his objection was not precluded by the stipulation.(*v*)

§ **1292**. Or the vendor may take a middle course, and, without excluding, may limit the inquiry. He may, for instance, exclude all objections in respect of a particular instrument,(*w*) or all objections to title earlier than a certain deed,(*x*) or he may sell merely an equitable and not a legal estate.(*y*)

§ **1293**. The cases on the question whether and how far the inquiry into title has been limited fall into two categories ; first, where the stipulations of the contract preclude the purchaser from making requisitions upon or inquiries from the vendor as to his title,—which relieves the vendor from the necessity of complying with or answering any such requisition or inquiry, but does not prevent the purchaser from showing, by any means in his own power, that the vendor's title is defective ; and secondly, cases in which the stipulations preclude the purchaser, not only from making such requisitions upon and inquiries from the vendor, but from making any inquiry or investigation about the title anywhere ;—which may quite validly be stipulated, and will generally, provided that the stipulation be clear, altogether preclude inquiry and investigation for every purpose.(*z*)

§ **1294**. Of the first of these categories an illustration may be found in the case of Darlington v. Hamilton(*a*) where there was a stipulation that the lessor's title should not be produced, and the purchaser discovered that the lessor's title was objectionable by reason of its being involved with the title to other property, so that the purchaser would run the risk of being ousted by reason of a

(*u*) Re Banister, 12 Ch. D., 131; cf. Harnett v. Baker, L. R. 20 Eq., 50. Distinguish Blenkhorn v. Penrose, 29 W. R., 237.

(*v*) Jones v. Clifford, 3 Ch. D., 779.

(*w*) Corrall v. Cattell, 4 M. & W., 734; S. C., 3 Y. & C. Ex., 413

(*x*) Taylor v. Martindale, 1 Y. & C. C. C., 658. Cf. per Malins, V. C., in Harnett v. Baker, L. R. 20 Eq., 53.

(*y*) Ashworth v. Mounsey, 9 Ex., 175. Cf. Official Manager of Sheerness Waterworks Co. v. Polson, 29 Beav., 70, 3 De G. F. & J., 36.

(*z*) See Jones v. Clifford, 3 Ch. D., 790

(*a*) Kay, 550. See, too, Shepherd v. Keatley, 1 Cr. M. & R., 117; Geoghegan v. Connolly, 8 Ir. Ch. R., 598, 604.

breach of covenant in respect to other property; and the court accordingly refused specific performance.

§ **1295**. On the other hand, where the condition provided that the lessors' title should neither be produced nor inquired into,(*b*) and the purchaser offered acts of parliament in evidence that the lessors (a public company), had no power to grant leases, the objection was held to be precluded.(*c*)

§ **1296**. But conditions restrictive of a purchaser's common law rights are, as we have seen,(*d*) construed very strictly. Thus in Waddell v. Wolfe,(*e*) where on a sale of leaseholds held by underlease there was a condition that no requisition or inquiry should be made respecting the title of the lessor, or his superior landlord, or his right to grant the underlease, and the purchaser, in investigating the title, discovered for himself that the lessor had no power to grant the underlease, it was held that the purchaser was not precluded by the condition from insisting on the objection. The court appears to have considered that the language of the condition pointed only to requisitions and inquiries between vendor and purchasor; so that the case really fell within the principle of Darlington v. Hamilton.(*f*)

§ **1297**. Again, in Smith v. Robinson,(*g*) the defendant having in 1877 agreed to purchase freehold property, subject to a condition that the abstract should commence with a deed dated in 1867, and that no earlier or other title should be required or inquired into by the purchaser, there happened to be, among the muniments handed to the defendant's solicitor for comparison with the abstract, a deed, of the existence of which the vendor was then ignorant, which threw grave doubt on the title; and it was held that, the objection having arisen not from any requisition or inquiry by the purchaser but from the vendor's own disclosure, the condition did not apply.

§ **1298**. Generally, where an estate is sold subject to conditions of sale as to title, the inquiry is whether a good title is made in accordance with such conditions.(*h*)

(*b*) See now the Vendor and Purchaser Act, 1874, s. 2 (1); infra, § 1317.

(*c*) Hume v. Bentley, 5 De G. & Sm., 520. Spratt v. Jeffery (10 B. & C., 249), which is at variance with the distinction above stated must now be considered as overruled.

(*d*) See supra, § 1153 et seq.

(*e*) L. R. 9 Q. B., 515. Cf. Musgrave v. McCullagh, 14 Ir. Ch. R. 496.

(*f*) Kay, 550; supra, § 1294.

(*g*) 13 Ch. D., 148.

(*h*) See §§ 1281, 1337; and consider Meyrick v. Laws, 34 Beav., 58.

§ **1299**. Accordingly, in the case of Re Banister(*i*) already referred to, although the purchaser was relieved against a misleading condition, still, as the conditions professed on their face to give only a good holding title, the reference was confined to ascertaining whether such a title could be made out.(*j*) So, again, where at the time of the written contract (an open one), being signed, the purchaser verbally agreed to take a limited title, and negotiations went on for a long time upon that footing, the court at the hearing limited the inquiry as to title accordingly.(*k*) And where A. contracted with B. for a lease, B. knowing the purposes for which A. wanted the house, and A. knowing that B.'s title was merely leasehold, a reference was directed having regard to the covenants in the lease, and the purposes for which the premises were taken.(*l*)

§ **1300**. Generally, either vendor or purchaser has a right to have the inquiry in question—the one thing entitled to an opportunity of perfecting, and the other of investigating the title. But there may be, on the part of either of them, a waiver of the right.

§ **1301**. Thus, if the vendor states his title, and conclusively avers that he can make no other or better title, and the title disclosed is objected to by the purchaser, the court may decide without a reference :(*m*) but if in such a case the decision were in favor of the vendor, it seems that the purchaser would then be entitled to call for a reference.

§ **1302**. But it is with regard to a waiver by the purchaser that this question more often arises : for a purchaser originally entitled to examine the vendor's title may subsequently waive that right, either expressly or by implication ; and this waiver may be either as to the whole title or limited to parts :(*n*) and in case of an express waiver, it may be either absolute or conditional.

§ **1303**. An admission of title by a defendant in his pleading is an express waiver, which excludes the right to a reference of title : for this purpose it is enough if the de-

(*i*) 12 Ch D., 131; supra, § 1166.
(*j*) See too Smith v. Robinson, 13 Ch. D., 148.
(*k*) McMurray v. Spicer, L. R. 5 Eq., 528
(*l*) Wilbraham v. Livesey, 18 Beav., 206. For form of reference where the vendor has a power of sale with the consent of trustees, see Graham v. Oliver, 3 Beav., 124. Rose v. Calland. 5 Ves., 186; Omerod v. Hardman, 5 Ves., 722, explained in Jenkins v. Hiles, 6 Ves., 654-5. See too Austin v. Martin, 29 Beav., 535.
(*m*) e. g. Corless v. Sparling, I. R 8 Eq., 335.
(*n*) Townley v. Bond, 2 Dr. & War., 240 261.

fendant pleads belief that at the time of the contract the plaintiff had a title;(*o*) or even if, the plaintiff having pleaded the facts constituting his title, they are not denied (specifically or by necessary implication), or stated to be not admitted, in the pleading of the defendant.(*p*)

§ **1304**. But this waiver, where not express, must be clearly implied from the acts of the purchaser. "The court," said Lord Eldon, "will at least take care that, where it is contended that the defendant has waived his right to a reference, it shall be clear that there was no surprise upon him, and that there has been a full and fair representation as to the title on the part of the plaintiff:"(*q*) and so where the vendor relies on any dealings in respect of the abstract as a waiver of objections to title, the contents of the abstract must raise the objection in question clearly and explicitly, and not merely by inference or notice.(*r*)

§ **1305**. It is often the case that there is only a particular objection to the title that is of moment, and it is then frequently a question whether the purchaser has not waived all right to object to it.

§ **1306**. The cases thus fall into three classes: (1) those of acts done by the purchaser after the objection is known to him, the objection being in its nature curable; (2) those of similar acts where the defect is incurable, and (3) those of acts before the objection is known to the purchaser. It is evident that under the last we may treat the question of a general waiver of title.

§ **1307**. (3) Where the defect, though known, is yet one which it is, or may be, in the power of the vendor to remedy, acts which indicate an intention to complete may yet not amount to a waiver, because they may be done in the faith and expectation that the remedy will be applied. And a negotiation about the objection between the parties after the acts is, on this principle, an evidence that it was not waived.(*s*)

§ **1308**. (2) But where the defect is known to the purchaser, and is in its nature incurable, there no such expectation can arise, and much slighter acts will operate as

(*o*) Phipps v. Child, 3 Drew., 709.
(*p*) Ord. XIX. r. 17.
(*q*) In Jenkins v. Hiles, 6 Ves., 655; Haydon v. Bell, 1 Beav., 337.
(*r*) Blacklow v. Laws, 2 Ha., 40.
(*s*) Calcraft v. Roebuck, 1 Ves. Jun., 221.

indications of an intention to waive the objection. So where an estate, sold a freehold and leaseholds attached, turned out to be nearly all leasehold, and this clearly appeared as a defect which could not be cured, and the purchaser continued to treat, up to and long after the day for concluding the purchase, on points of title irrespective of this objection; he was held to have waived it.(*t*) So where an estate was subject as to part to a reservation of rights of sporting, which appeared on the abstract, and which the vendor could not cure, and after the delivery of the abstract the purchaser took possession; he was held to have waived his right to object to the reservation in question.(*u*) And where the invalidity of a fiat on which the title depended was known to the purchaser, his granting a lease of the property was held a waiver.(*v*) And, where the defect alleged was an erroneous and misleading description of the situation of a house, but the purchaser had proceeded to investigate the title after this was known, he was held to have waived all objection on the score of misdescription.(*w*)

§ **1309**. So with regard to the contract itself—if the defendant contends that it is a nullity, and, after having become aware of the facts on which he relies for this contention, has gone on acting as though there were a subsisting contract, he will be estopped from subsequently taking the objection.(*x*)

§ **1310**. Where, either by the terms of the original contract, or by a subsequent arrangement, it is agreed that the purchaser shall take possession and shall be entitled to a good title, no waiver is worked by the possession, or by any acts which do not go beyond the acts of a person entrusted with the possession and bound to take care of the estate. So where a person purchased a share in some iron works to which a good title was to be made in about a year, and it appeared to be the intention of both parties that the purchaser should previously take possession and act as partner, his doing so was no waiver of his right to a good title.(*y*)

(*t*) Fordyce v. Ford, 4 Bro. C. C., 494; S. C., 6 Ves., 679.
(*u*) Burnell v. Brown, 1 J. & W., 168.
(*v*) Ex parte Sidebotham, 1 Mont. & Ayr., 655; Ex parte Barrington, 2 Mont. & Ayr., 245.
(*w*) Stanton v. Tattersall, 1 Sm. & G., 529. (The contract was, however, rescinded on another ground.)
(*x*) Flint v. Woodin, 9 Hà., 618; Campbell v. Fleming, 1 A. & E., 40.
(*y*) Stevens v. Guppy, 3 Russ., 171; Margravine of Anspach v. Noel, 1 Mad., 310, 315.

§ **1311**. In Burroughs v. Oakley(*z*) the original contract was silent as to possession, but possession having been taken by the purchaser, and both parties having for more than a year subsequently continued negotiating as to title, Plumer, M. R., concluded that possession was prematurely taken with the consent of both parties, but without an intention of waiving the investigation of title: and so where a purchaser took possession, with the vendor's leave, pending an answer to a requisition as to the tenure of the property, he was held to have not thereby waived the requisition.(*a*)

§ **1312**. (3) Acts of owership on the part of a purchaser may amount, in the contemplation of the court, to a declaration that he considers himself as the owner of the property, and then they work an acceptance of title and a waiver of all objections; or secondly, such acts, though falling short of this, may yet, by changing the property which is subject to the vendor's lien, affect that security, and therefore furnish a motive to the court to order the payment into court of the purchase-money.(*b*)

§ **1313**. It is obvious that, for acts to amount to the waiver of an objection before it is known, they must be very strong and distinct,(*c*)—such acts, in short, as are equivalent to a declaration by the purchaser that he has taken the estate at all possible risks, and considers himself as the absolute and unconditional owner of it, and so preclude any investigation of title at all. Therefore in a case where the objections were not known, the stubbing up of an osier-bed and filling up a pond, though held to justify an order for payment of the purchase-money into court, and for a receiver, were not held to amount to a waiver of title.(*d*)

§ **1314**. Leaving the abstract unobjected to for two years, altering the property, letting it, and apologizing for not paying the purchase-money, which was of course only payable if the title was accepted, have been considered strong acts of a waiver.(*e*) And where the purchaser was in possession twenty years, and, after making frivolous

(*z*) 3 Sw., 159.
(*a*) Turquand v. Rhodes, 16 W. R., 1074.
(*b*) Cutler v. Simons, 2 Mer., 103.
(*c*) Dixon v. Astley, 1 Mer., 133.
(*d*) Osborne v. Harver, 2 Y. & C. C C., 116; Small v. Attwood, You., 506.
(*e*) Margravine of Anspach v. Noel, 1 Mad., 310.

objections and refusing any further explanation of them, still continued in possession, the right to investigate title was held to have been waived.(*f*) The like was held in a case where a purchaser continued twenty-six years in possession after his requisitions of title were sent in, and had paid a considerable part of his purchase-money, and made alterations.(*g*) In another case, Lord Romilly, M. R., expressed an opinion that the purchaser, having retained the abstract for five months and made no objections to the title, but simply got the vendor to verify the abstract with title-deeds, had thereby waived all objections as to title.(*h*) And where the purchasers of a leasehold interest, after investigating and accepting the vendor's title, delayed completion on the ground that they had since discovered an ancient lease, which they suggested (but did not attempt to prove) would override the vendor's interest; they were held to have lost the right to make any inquiry on the subject.(*i*)

§ **1315**. The right of investigation may sometimes be waived by the silence of a subsequent contract concerning it. Thus where, by a contract for the sale of an estate, the purchaser was entitled to evidence that the buildings were not on the copyhold part of the property, which, except to that extent, the vendor was not to be called on to distinguish from the freehold; the purchaser asked for evidence of the identity of the parcels in the abstract with the estate sold: subsequently, by a supplemental contract, the purchaser accepted the title, subject to the production of a declaration of the identity of the parcels in the deeds and land sold—which was produced and approved on the purchaser's behalf: and he subsequently objected that the buildings were on the copyhold part of the estate: it was held that this term of the original contract had been waived by the silence on that head of the supplemental one.(*j*)

§ **1316**. On the other hand, the mere acquiescence of both parties in not enforcing the completion of the contract,(*k*) the continuing of a treaty and at the same time insisting on the objection,(*l*) and the approval of the title

(*f*) Hall v. Laver, 3 Y. & C. Ex., 191.
(*g*) Wallis v. Woodyear, 2 Jur. N. S., 179 (Wood, V. C.). See too Bown v. Stenson, 24 Beav., 631.
(*h*) Pegg v. Wisden, 16 Beav., 239.
(*i*) Corbett v. The Commissioners of Her Majesty's Works, etc., 16 W. R., 889.
(*j*) Dawson v. Brinckman, 3 De G. & Sm., 376; S. C. 3 Mac. & G., 53.
(*k*) Blachford v. Kirkpatrick, 6 Beav., 232.
(*l*) Knatchbull v. Grueber, 1 Mad., 153.

by the purchaser's counsel,(*m*) have all been held sufficient to waive the purchaser's right to investigate the title of the vendor.

§ **1317**. By the vendor and purchaser act, 1874, s. 2 (1) it is enacted that (subject to any stipulation to the contrary in the contract) under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold. But in cases where the purchaser of a lease still has the right to inquire into the title of the lessor, conduct may waive that right which does not waive the right as to the title of the lessee.

§ **1318**. So where B. contracted with A. to take an assignment of a lease when executed, and inspected the lease and the assignment of it to A., and subsequently directed A. to cause an assignment to himself to be endorsed *totidem verbis*, he was held to be precluded from calling for the lessor's title.(*n*) Again, where a purchaser, after transmission to him of the original lease, prepared a draft assignment, and made various objections as to repairs and other matters, but did not require the production of the lessor's title, it seems that he would have been held to have waived the right, but the point was not decided.(*o*) And in a case which came before Lord Cranworth, he, affirming a decision of Stewart, V. C., held that joining in a valuation, advertising the property to be disposed of, and other like acts on the part of the lessee, which implied that nothing remained to be done but the execution of the lease, amounted to a waiver of his right to call for the lessors title.(*p*)

§ **1319**. In analogy with the distinction established by the above cases on conditions of sale as to the lessor's title, it is established that acts may amount to a waiver of a right to investigate the title, and yet not compel the purchaser to take it, if it come out collaterally that the vendor has no title. Thus in Warren v. Richardson,(*q*) the purchaser of a leasehold interest had done acts which the court, at the hearing, held to be a waiver of the right to investigate a

(*m*) Deverell v. Lord Bolton, 18 Ves., 505. Distinguish Corbett v. The Commissioners of Her Majesty's Works, etc., 16 W. R., 889.
(*n*) Smith v Capron, 7 Ha., 185, 189
(*o*) Clive v. Beaumont, 1 De G & Sm., 397.
(*p*) Simpson v. Sadd, 4 De. G. M. & G., 665, which see for the form of a declaration that the right to call for the lessor's title has been waived. See also Ogilvie v. Foljambe, 3 Mer., 66.
(*q*) You., 1.

title; but it appearing on the report of the Master, to whom it was referred to settle the lease and to state any special circumstances, that the vendor held this together with other leasehold property under one lease, and subject to one proviso for re-entry, so that the vendor, who was plaintiff, could not make a good title; the court refused to enforce the completion of the contract on the defendant.

§ **1320**. Where the purchaser, having discovered a material defect in the title in the course of his investigation of it, gave notice to determine the contract, and immediately afterwards bought up the interest which had constituted his objection, it was held that, having thus by his own voluntary act cured the defect, he could not avail himself of this purchase for the purpose of destroying the original contract; and specific performance was decreed against him.(*r*)

§ **1321**. With regard to the proper mode of pleading that the right to investigate the title has been waived, it was decided by Knight Bruce (then V. C.) in Clive v. Beaumont,(*s*) that it was not enough for the party relying on such waiver to allege facts from which it is a legal inference; but that he must allege the facts and that there had thereby been such waiver. And this seems to be the proper course under the present practice of the high court.(*t*)[1]

§ **1322**. With regard to the stage of the proceedings at which the reference of title may be obtained, it will be convenient briefly to refer to the former practice of the Court of Chancery, inasmuch as the principles upon which that practice was based will no doubt continue to be observed by the high court, so far as they are applicable to the present procedure.

§ **1323**. The inquiry as to title might be directed by the Court of Chancery,

(*r*) Murrell v. Goodyear, 1 De G. F. & J., 432.
(*s*) 1 De G & Sm., 397. See to Gaston v. Frankum, 2 De G. & Sm., 561. Cf. Hughes, v. Jones, 3 De G. F. & J., 316-7.
(*t*) Ord. XIX. r., 18.

[1] *Waiver of tender.*] A tender need not be averred by the plaintiff, where he avers and proves that the defendant refused to fulfil the contract, and expressly waived a tender. Martin v. Merritt, 57 Ind., 34.

Cross bill in specific performance.] Where the vendor, by his answer to the action of the vendee, submit to perform, it is competent for him, by a cross bill, to compel the vendee to perform also. He cannot, however, after resisting performance, and where the property has depreciated in value, compel specific performance by the vendee. Tobey v. Foreman, 79 Ill., 489.

(1) At the hearing:

(2) On motion before the hearing but after the answer:

(3) On motion before answer.

The practice of allowing this inquiry to be directed on motion was introduced by Lord Thurlow.(*u*)

§ **1324**. (1) Where an inquiry as to title alone was directed at the hearing, it was taken as excluding all other questions but that of title, so that the court would not, on further consideration, enter into any other question set up as a defense by the answer.(*v*)

§ **1325**. (2) The inquiry might be directed before the hearing where, the defendant having answered, there was no other question on the record but that of title, or where, there being some other question, the objection on that score was removed by consent.(*w*)

§ **1326**. Where other questions were raised, but the court, on looking into the defendant's answer, saw that they were merely frivolous and entirely unworthy of argument, it would treat them as no questions at all, and direct the inquiry as if they had not been raised.(*x*)

§ **1327**. Unless, however, the other question raised by the answer were merely frivolous, even though the defendant's contention might be such as the court judged unlikely to succeed, an inquiry before the hearing—which was in one case described by Leach, V. C., as "in its nature an extraordinary indulgence to the plaintiff, out of the common course of proceedings,"(*y*)—was not granted.(*z*)

§ **1328**. Accordingly, such references were refused in the following cases:—where there was a claim for compensation,(*a*) even though the defendant submitted to complete his contract;(*b*) where a purchaser insisted on laches as a defense;(*c*) where there was a question as to the production of a lessor's title:(*d*) and where there was a question whether there was any subsisting contract.(*e*) "The rule was quite obstinate," said Lord Eldon in the last-cited

(*u*) 1 Sw., 551 n.; Anon. v. Skelton, 1 V. & B., 517; Eldridge v. Porter, 14 Ves., 139; Cons. Ord. XX. See also Briscoe v. Brett, 2 V. & B., 377.

(*v*) Le Grand v. Whitehead, 1 Russ., 309; cf. Hood v Oglander, 34 Beav., 513.

(*w*) Blyth v. Elmhirst, 1 V. & B. 1; Paton v. Rogers, 1 V. & B. 351; Moss v. Matthews, 3 Ves., 279; Wright v. Bond, 11 Ves., 39.

(*x*) Withy v. Cottle, T. & R., 78; Boehm v. Wood, 1 J. & W., 419; Boyes v. Liddell, 1 Y. & C. C. C., 133; Wood v. Machu, 5 Ha., 158.

(*y*) Gordon v. Ball, 1 S. & S., 180.

(*z*) Withy v. Cottle, 1 S. & S., 174; Gordon v. Ball, 1 S & S., 178; Portman v. Mill, 2 Russ., 570.

(*a*) Paton v. Rogers, 1 V. & B., 351.

(*b*) Lowe v. Manners, 1 Mer., 19.

(*c*) Blyth v. Elmhirst, 1 V. & B., 1.

(*d*) Gompertz v. Anon, 12 Ves., 17.

(*e*) Morgan v. Shaw, 2 Mer., 138.

case, "that a reference of title cannot be had except in a case where there is no question but of title; and this must be the rule; for otherwise, we should fall into the absurdity of having the master's report upon a title, and a subsequent decision that there is no subsisting agreement."(*f*)

§ **1329**. By questions of title are meant those which can only become properly the subject of adjudication upon the investigation of the title, although they may not arise on the abstract taken by itself; so that where, the validity of the conditions of sale being admitted, the question was as to the application of them, the question was held to be one of title.(*g*)

§ **1330**. Where the circumstances were such as, on the principle already stated, to justify this inquiry on motion, the Court of Chancery would make it on such an application, even though the question in dispute might be one which could be conveniently disposed of at the hearing without a reference.(*h*)

§ **1331**. In one case, where the defendants by their answer set up inability on the part of the plaintiff to make a title, and further that he has not done so within a period specified by the contract for that purpose, and had also delivered a notice to rescind the contract, Turner and Knight Bruce, L. J. J., affirming the decision of Stewart, V. C., held that the defendants were not entitled to move, before the hearing, for a reference as to title according to the contract, and when first shown, without prejudice to any question in the cause. Turner, L. J., expressed a doubt whether defendants could ever so move successfully.(*i*)

§ **1332**. (3) An inquiry as to title might also be made on motion before answer, where the vendor, being plaintiff, undertook to do all such acts for the purpose of executing what the court should think right, as if the answer had been put in,(*j*) and it being admitted at the bar that there was no other question than that of title.(*k*) Where such an admission was not made, the motion was refused.(*l*) Nevertheless in one case Shadwell, V. C., held that, after such a reference, the defendant might by his answer, which

(*f*) 2 Mer., 140.
(*g*) Machu, 5 Ha., 158, 161.
(*h*) Curling v. Flight, 5 Ha., 248.
(*i*) Reed v. Don Pedro North Del Rey Gold Mining Co., Limited, 3 De G. J. & S., 593, 595.
(*j*) Balmanno v. Lumley, 1 V. &. B. 224.
(*k*) See per Lord Eldon in 1 Mer., 372.
(*l*) Matthews v. Dana, 3 Mer., 470.

was called for by the plaintiff, make any defense he pleased, and was not confined to the question of title.(*m*) "It does not appear," said the Vice Chancellor, "on the face of the order of reference, that the defendant did not object to the order being made, or that he said that there was no objection as to title."(*n*) It would seem from this that the order should have been prefaced with such a declaration.

§ **1333**. In the case of Phillipson v. Gibbon,(*o*) the propriety of the vendor taking the earliest possible opportunity of obtaining the reference, where only title is in question, was plainly intimated by James, L. J. "In almost every case," said his Lordship, "It is the duty of a vendor, where there is no question but that of title between him and the purchaser, to avail himself of the opportunity of having an immediate reference as to title and so saving a multiplication of unnecessary costs.(*p*)

§ **1334**. The inquiry as to title is now, it is conceived, obtainable either under Ord. XXXIII., which provides that "the court or a judge may, at any stage(*q*) of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be taken, notwithstanding that it may appear that there is some special or further relief sought for, or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner;"(*r*) or, in an appropriate case, under the eleventh rule of Order XL., providing that "any party to an action may, at any stage thereof, apply to the court or a judge for such order as he may, upon any admission(*s*) of facts in the pleadings, be entitled to, without waiting for the determination of any other question between the parties. * * * Any such application may be made by motion, so soon as the right of the party applying to the relief claimed has appeared from the pleadings. The court or a judge may, on any such application, give such relief, subject to such terms, if any, as such court or judge may think fit."(*t*)

§ **1335**. The order for reference is not strictly confined to an inquiry whether a good title can be made, but may

(*m*) Emery v. Pickering, 13 Sim., 583.
(*n*) 13 Sim., 584.
(*o*) L. R., 6 Ch., 428.
(*p*) L. R. 6 Ch., 435.
(*q*) For form of judgment where the inquiry is directed, see Seaton, 1287.
(*r*) Compare Consol. Ord. XX., and see Ord. I. r. 3; also Ord. XXXVI. r. 6.
(*s*) See Symonds v. Jenkins, 24 W. R., 512.
(*t*) The Judge of first instance has a discretion as to making or refusing an order under this rule. Mellor v. Sidebottom, 5 Ch. D., 343 (C. A.)

extend to everything that appears to be connected with the title.(*u*) It should therefore include an inquiry as to the time at which a good title was shown,(*v*) unless for some reason stated at the time—*e. g.*, that the contract itself,(*w*) or the plaintiff's right to specific performance,(*x*) has been disputed—and by the express direction of the court, this inquiry was omitted.(*y*) As this inquiry, if to be made at all, should be directed at the original reference, the court has refused to direct it subsequently on a second motion.(*z*)

§ **1336**. On the same principle, the inquiry may extend to whether it appeared by the abstract that a good title could be made :(*a*) and on the like ground, an inquiry was in one case added whether the defendant objected at any time to the want of evidence as to the identity of the premises ; but an inquiry whether the abstract was perfect, and if deficient, in what respects, and whether it was ever perfected, was considered to be not so connected with the title as to be added to the reference.(*b*)

§ **1337**. The inquiry may be limited in any manner appropriate to the circumstances of the particular case, as, for instance, by directing that regard is to be had to, or that the inquiry is to be made subject to, specified requisitions or declarations.(*c*)

§ **1338**. In Harnett v. Baker,(*d*) the court (Malins, V. C.), having come to the conclusion that a condition of sale restrictive of the title was not binding on the purchaser, on the ground that it was founded on an erroneous statement of facts which the vendor was bound to know was erroneous, held that the vendor (plaintiff) must either take an open reference of this title (which he refused), or have his bill dismissed with costs.

§ **1339**. The inquiry is whether the vendor can make a good title, not whether he could do so at the date of the contract ; and therefore, when one of the inquiry has been

(*u*) Jennings v. Hopton, 1 Mad., 211; Bennett v. Rees, 1 Ke., 408; Enraght v. Fitzgerald, 2 Dr. & War., 43. See too Gedye v. Commissioners of Public Works, 16 W. R. 1106.

(*v*) Seton, 1297, 1303. See Foxlowe v. Amcoats, 3 Beav., 496.

(*w*) Gibbons v. North-Eastern Metropolitan Asylum District, 11 Beav., 1; Morris v. Wilson, 5 Jur. N. S., 168.

(*x*) Potter v. Crossley, 5 W. R., 35.

(*y*) Bennett v. Rees, 1 Ke., 409 The old practice on this point was somewhat variable. Moss v. Matthews, 3 Ves , 279; Gibson Clarke, 2 V. & B., 103

(*z*) Hyde v. Wroughton, 3 Mad., 279.

(*a*) Wright v. Bond, 11 Ves., 39; Horniblow v. Shirley, Seaton, 1298; Jennings v. Hopton, 1 Mad., 211.

(*b*) Bennett v. Rees, 1 Ke., 405, 408-9.

(*c*) Saul v. Bolton, Seton, 1297; Remnant v. Holt, Id., 1298; Hume v Pocock, L. R. 1 Eq., 423, 431, 1 Ch , 377; and supra, §§ 1298, 2299.

(*d*) L. R. 20 Eq., 50, 58.

directed,(*e*) he may make out his title at any time before the certificate, and if he can do so he will be entitled to a judgment or order in his favor,(*f*) at least where there has been no unreasonable delay, and time is not material.(*g*)

§ **1340**. The Court of Chancery often allowed time for the completion of the title: in an old case it more than once allowed the vendor time to get an act of Parliament;(*h*) and where upon the face of the contract it appeared that there was a difficulty in the plaintiff's title, Lord Hatherley (then Wood, V. C.,) refused on demurrer to stop a suit for specific performance, on the ground that the act of Parliament contemplated had not been obtained.(*i*) So, in another case, the court allowed the vendor time to procure a small part of the estate:(*j*) and, in another case, allowed a limited time to procure the concurrence of an assignee in insolvency.(*k*)

§ **1341**. The court grants indulgence in point of time for getting over any difficulties in matters of conveyance, as much where the vendor is the plaintiff, as where the proceedings are instituted by the purchaser.(*l*)

§ **1342**. But this indulgence will not be granted where the defect to be remedied was known to the vendor or his agent, and was concealed from the purchaser;(*m*) nor where there has been great delay, and there is no probable chance of the difficulty being got over in a short time;(*n*) so that a purchaser under the court would be discharged if it appeared requisite to his title that an account should first be taken in an action to be instituted,(*o*) or that an action should be instituted to try whether certain devisees were trustees for the seller or not.(*p*)

§ **1343**. Nor will the court grant additional time where the vendor proposes, not to cure a defect in the title which he had at the sale, or to produce fresh evidence in support of it, but to get an entirely new title: for the court will not

(*e*) Questions as to time and delay may, it is conceived, be properly raised on the application for the inquiry.

(*f*) Bennet College v. Carey, 3 Bro. C. C., 390; per Lord Eldon in Jenkins v. Hiles, 6 Ves., 655, and in Seton v. Slade, 7 Ves., 279; Wynn v. Morgan, 7 Ves., 292, 315; Vancouver v. Bliss, 11 Ves., 458.

(*g*) Langford v. Pitt, 2 P. Wms., 629.

(*h*) Lord Stourton v. Meers, cited 2 P. Wms., 630. See also Lord Braybroke v. Inskip, 8 Ves., 417, 436; Coffin v. Cooper, 14 Ves., 205.

(*i*) Devenish v. Brown, 26 L. J. Ch. 23.

(*j*) Chamberlain v. Lee, 10 Sim., 444.

(*k*) Sidebotham v. Barrington, 4 Beav. 110. See too on this point, Re Banister, 12 Ch. D., 145.

(*l*) Duke of Beaufort v. Glynn, 3 Sm. & G., 213

(*m*) Dalby v. Pullen, 3 Sim., 29; S. C. 1 R. & My., 296.

(*n*) Fraser v. Wood, 8 Beav., 339.

(*o*) Magennis v. Fallon, 2 Moll., 561.

(*p*) Noel v. Hoy, St. Leon. Vend., 293.

force a buyer to take an estate from a vendor who is neither owner of it, nor possessed of the power by the ordinary course of legal proceedings to make himself so;(*q*) for it is not the purpose of the court to enable one man to sell another man's estate.(*r*) As to this point, it was in one case decided that a title from possession defeasible by the crown on account of the alienage of the original owner, cured by a grant from the crown whilst the question was in the master's office, was the same title, and the purchaser was compelled to take it.(*s*) And the fact that the vendor may have had no title to a small part of the estate at the time of sale, and subsequently purchases it, will not make the title a new one within this rule.(*t*)

§ **1344**. But even where the vendor has no title at all at the time of sale, so that the purchaser may withdraw if he choose, yet, if he acquiesce in steps taken by the vendor to get in the estate, he will thereby have waived the want of mutuality, and be bound to accept the title, if made out at the trial or other necessary time.(*u*)

§ **1345**. The inquiry as to title takes place in the chambers of the judge, and the result is embodied in a certificate of his chief clerk, which, when approved by the judge, is signed by him, and filed in the central office of the court.(*v*)

§ **1346**. Evidence by affidavit of matters of fact material to the title is admissible under a reference of title.(*w*) Accordingly where, under such a reference, after the conveyancing counsel had given his opinion in favor of the title, but before the certificate had been actually signed, a very serious defect of title, not in any way disclosed or raised by the abstract, was discovered by the purchaser's inspecting the property, evidence of the matters so discovered was admitted.(*x*)

§ **1347**. Whatever can be done in chambers upon a reference as to title under a judgment where the contract is established, can be done upon proceedings under the ninth section of the vendor and purchaser act, 1874, already

(*q*) Tendring v. London, 2 Eq Cas. Abr., 680, pl. 9; Magennis v. Fallon, 2 Moll., 561.
(*r*) Chamberlain v. Lee, 10 Sim., 444.
(*s*) Eyston v. Simmons, 1 Y. & C. C. C., 608.
(*t*) Chamberlain v. Lee, 10 Sim., 444.
(*u*) Hoggart v. Scott, 1 R. & My., 293; Salisbury v. Hatcher, 2 Y. & C. C. C., 54. see supra, §§ 447, 448, and Murrell v. Goodyear, 1 De G. F. & S., 432.
(*v*) Dart, Vend. (5th ed.), 1099; Ord. LXA. As to objecting to the certificate before it is signed by the Judge, see Parr v. Lovegrove, 4 Drew., 170.
(*w*) Re Burroughs, Lynn and Sexton, 5 Ch. D., 603.
(*x*) Phillipson v. Gibbon, L. R. 6 Ch., 428.

referred to.(*y*) That act enables the parties in such cases to dispense with the formal pleadings of an action, and at once to put themselves in chambers in exactly the same position in which they would have been, and with all the rights which they would have had, under the old form of decree.(*z*)

§ **1348**. The certificate should, it seems, be on the fact of title aye or no: and accordingly it is improper to certify that a defendant with the concurrence of a third party could make a good title,(*a*) or that he could do so subject to the performance of certain conditions;(*b*) but where the certificate is against the title, it should state the precise points in which it is defective.(*c*)

§ **1349**. If any party is dissatisfied with the certificate as filed, he must apply (by summons or motion) to discharge or vary it within eight clear days from the filing; otherwise, at the expiration of that time it becomes binding on all the parties to the proceedings, and will not afterwards be opened except upon special grounds.(*d*)

§ **1350**. If the certificate is in favor of the title, and either no application to discharge or vary it is made, or such application fails, specific performance will generally be ordered at the hearing (original or on further consideration, according to the stage at which the reference was directed), of the action.(*e*) After such an application has failed, it seems that no other objection to the title can be made.(*f*)

Under the old practice, where the report was in favor of the title, but the court thought it too doubtful to force on a purchaser, the court might dismiss the bill without allowing the exceptions,(*g*) and either with(*h*) or without(*i*) costs, as the court might think right.

§ **1351**. Where the court varies a certificate in favor of the title,(*j*) or refuses to vary one against it,(*k*) and the ven-

(*y*) Supra, § 1106.
(*z*) Re Burroughs, Lynn and Sexton, 5 Ch. D., 604.
(*a*) Lewis v. Loxam, 1 Mer., 179.
(*b*) Magennis v. Fallon, 2 Moll., 561, 575, 583. See too Esdaile v. Stephenson, 6 Mad., 366.
(*c*) Green v. Monks, 2 Moll., 325.
(*d*) Howell v. Kightley, 8 De G. M. & G., 325.
(*e*) See Dart, Vend. (15th ed.), 1109. Consider Jeudwine v. Alcock, 1 Mad., 597.
(*f*) Brooke v. Anon., 4 Mad., 212. As to the effect of a direction that the vendor shall convey, see Minton v. Kirwood, L. R. 3 Ch., 617.
(*g*) Bickner v. Milner, 1 Ha., 578 n.
(*h*) S. C.
(*i*) Wilson v. Bellairs, T. & R., 491.
(*j*) Egerton v. Jones, 1 R. & My., 694.
(*k*) Consider Brewster v. Woodall, (Hall, V. C., 22nd July, 1878), cited Seton, 1299.

dor desires to have an opportunity of making out a better title, the certificate is generally, upon the hearing of the application to vary, referred back to chambers for review ;(*l*) and the vendor will be allowed a reasonable time within which to remove the objection.(*m*) On the other hand, when the matter has gone back to chambers, and a new abstract of title has been delivered, further objections may be brought in.(*n*)

§ **1352**. The Court of Chancery referred back the question of title where the master (now represented by the chief clerk) was satisfied with evidence of a fact with which the court was not satisfied, the vendor offering to produce further evidence ;(*o*) also where, by expressing an opinion in favor of some part of the title, the master had prevented the vendor from showing that the title was good, even supposing that part not to be so.(*p*)

When the report (now the certificate), was against the title, and the defect was cured at the hearing on further directions, the Court of Chancery compelled specific performance,(*q*) without giving time for further proceedings: but if there was a question whether the defect was in part cured, the court would refer it back to the master to review his report with the additional circumstances.(*r*.)

§ **1353**. In a case where the certificate was against the title, but it appeared that, since the contract, the purchaser had by his own act acquired the means of curing the defect, the court refused to dismiss the vendor's bill.(*s*)

§ **1354**. But, generally, if the certificate is against the title, and either no application is made to discharge or vary it, or such application fails, the action will be dismissed.(*t*)

§ **1355**. In one case, where the vendor was plaintiff and a deposit had been paid, the vendor was ordered to repay it with interest at four per cent, and it was declared that the purchaser was entitled to a lien on the estate for the deposit and interest, and also for his costs of the action, with liberty

(*l*) Curling v. Flight, 2 Ph., 616, 619. Cf. Rhodes v. Ibbetson, 4 De G. M. & G., 787.
(*m*) Portman v. Mill, 1 R. & My., 696.
(*n*) See Brooke v. Anon, 4 Mad., 212.
(*o*) Andrew v. Andrew, 3 Sim., 390.
(*p*) Egerton v Jones, 3 Sim., 392; S. C. 1 R & My., 694; Portman v. Mill, 1 R. & My., 696; Fildes v. Hooker, 2 Mer., 424. See also Jeudwine v. Alcock, 1 Mad., 597.
(*q*) Paton v Rogers, 6 Mad., 256
(*r*) Esdaile v. Stephenson, 6 Mad., 366.
(*s*) Hume v. Pocock, L. R. 1 Eq., 662; cf. Murrell v. Goodyear, 1 De G. F. & J., 432.
(*t*) See Dart, Vend. (5th ed.), 1111; Pretty v. Solly, 26 Beav., 613. Distinguish Gedye v. Commissioners of Public Works, 16 W. R., 1106.

to apply at chambers to give effect to the lien, and thereupon the bill was dismissed, with costs.(*u*)

§ **1356**. As an ordinary rule, costs are given not to, but against, a vendor up to the time at which he has first shown a good title.(*v*)[1] But there is also another general rule, that if a purchaser has taken certain objections to the title of the vendor, and those objections which have been the cause of the litigation are overruled, the vendor will be entitled to his costs, and the purchaser will not escape paying them by reason of some evidence, the want of which was never the subject-matter of dispute between them, not having been supplied until the title was investigated in chambers.(*w*)

And where a defendant prevented the plaintiffs (vendors) from obtaining the usual reference as to title on interlocutory motion by setting up defenses which, at the hearing, he failed to establish, he was ordered to pay the plaintiffs' costs up to and inclusive of the hearing.(*x*)

§ **1357**. In the inquiry as to the time when a good title was shown is involved the question, what is showing a good title.(*y*) In relation to this, two distinctions are to be borne in mind, the one between questions of title and of conveyance, the other between questions of title and of evidence.

§ **1358**. As to the first, the rule was thus stated by Lord Eldon in Lord Braybroke v. Inskip:(*z*) "As to the question whether the abstract was complete, the abstract is complete whenever it appears that, upon certain acts done, the legal and equitable estates will be in the purchaser. That may be long before the title can be completed." So that a good title is shown when it appears from the abstract that the vendor has the whole equity, and in what persons the outstanding portion of the legal estate is vested.(*a*) The acts to be done, of which Lord Eldon speaks, must be confined

(*u*) Turner v. Marriott, L. R. 3 Eq., 744.
(*v*) Phillipson v Gibbon, L R 6 Ch., 434.
(*w*) S C, 434. Cf. Bridges v. Longman, 24 Beav., 27.
(*x*) Hyde v. Dallaway, 4 Beav., 606.
(*y*) See §§ 1281, 1362.
(*z*) 8 Ves., 436.
(*a*) Avarne v Browne, 14 Sim., 303; Camberwell and South London Building Society v. Holloway, 13 Ch. D., 754, 763.

[1] *Demand as having relation to the question of costs.*] Where a party is entitled to a conveyance on request, he may commence an action for specific performance without previous request. Proof of previous demand in equity is only important in reference to costs. The party liable to perform is put in the wrong, where there is a demand and refusal, and is chargeable with costs. Bruce v. Tilson, 25 N. Y., 194; see, also, Gray v. Daugherty, 25 Cal., 266; Jones v. City of Petaluma, 36 id., 230; Morris v. Hoyt, 11 Mich., 9.

to acts the performance of which the vendor can enforce in a court of justice, as, for instance, by calling on a trustee to convey the estate vested in him. Therefore, where an estate tail was outstanding in a person who had consented to bar it, but was not in any way a trustee for the vendor, the court held that the title was not made out till the recovery had been fully perfected.(*b*)

§ **1359**. In Esdaile v. Stephenson,(*c*) Leach, V. C., after consultation with Lord Eldon, laid down the rule "that where a necessary party to the title was neither in law or equity under the control of the vendor, but had an independent interest, unless there was produced to the master a legal or equitable obligation on the part of the stranger to join in the sale, the master ought to report against the title; otherwise where a necessary party to the title was under the legal or equitable control of the vendor, as a mortgagee, where the master might well report that upon payment of the mortgage a good title could be made."

§ **1360**. The rule is further illustrated by other cases. In one, it was held to be no objection to title, that a satisfied term was outstanding in a lunatic against whom no commission had issued, so that there was then no person competent to make the assignment:(*d*) and in another case, the legal estate of a moiety of the property was outstanding in a married woman or those claiming under her, but she being under the order of the court to convey was bound by it, and became absolutely a trustee for the purchaser under the order of the court: the title was therefore held good, but without prejudice as to the question of conveyance.(*e*)

§ **1361**. It appears to have been considered by Shadwell, V. C., to be sufficient, if the abstract showed that the outstanding legal estate had been formerly vested in a trustee for the vendor, and that the abstract was then complete, though a supplemental abstract was necessary to trace the legal estate.(*f*) But this decision seems at variance with the rule enunciated by him in the same case, of which one condition is that the abstract must disclose in whom the legal estate is vested, not in whom it was formerly vested. And accordingly Lord Gifford, M. R., held that where an

(*b*) Lewin v. Gust, 1 Russ., 325.
(*c*) 6 Mad., 366.
(*d*) Berkeley v. Dauh, 16 Ves., 380.
(*e*) Jumpson v. Pitcher, 1 Coll., 13.
(*f*) Avarne v. Brown, 14 Sim., 303.

abstract only showed that the legal estate had long since been vested in persons who would be trustees for the vendor, but did not show in whom the legal estate was then vested, the defect was one of title and not of conveyance.(*g*)

§ **1362**. A distinction has also been taken between *showing* and *making* a good title. A good title is *shown* when all the matters essential to the title are stated in the abstract: it is *made*, when those matters are proved.(*h*)

§ **1363**. It is evident, further, that there is a distinction to be drawn between matters of title and of the evidence, whereby that title is supported. The verification of the abstract may be either the one or the other: thus, the verification of the deeds stated in the abstract is matter of evidence; whilst, on the other hand, the proof of a fact essential to the title, which can only be proved by evidence documentary or oral—as, for example, the identity of a person, or of parcels apparently different on the deeds—is a matter of title.(*i*)

(*g*) Wynne v. Griffith, 1 Russ., 283. See, further, as to what is a perfect abstract, per Wigram, V. C., in Morley v. Cook, 2 Ha., 111; Ward v. Ghrimes, 11 W. R., 794; and per Kindersley, V. C., in Oakden v. Pike, 13 W. R., 674; 11 Jur. N. S., 666.

(*h*) Parr v. Lovegrove, 4 Drew, 170, 181.

(*i*) Sherwin v. Shakspear, 17 Beav., 267, 275; varied on appeal, 5 De G. M. & G., 517.

CHAPTER V.

OF INTEREST, RENTS, DETERIORATION, AND PAYMENT INTO COURT.

§ **1364**. In the case of every contract of sale, the question arises—At what time does the property in the thing sold pass from the vendor to the purchaser?[1]

In the case of a contract for the sale of real or chattel real property in this country, the answer to this question involves important consequences, some of which it is proposed to discuss in the present chapter. It will be convenient, therefore, briefly to consider the effect of such a contract as between the parties to it.

§ **1365**. Where such a contract is entered into, the legal estate in the property passes, not by the contract, but only upon and by virtue of the execution of a subsequent formal deed of conveyance.(*a*) The equitable estate or beneficial ownership, however, passes, as between the contracting parties, by the contract itself(*b*) but only *sub modo*, or, in other words, conditionally upon the contract being ultimately completed by the fulfillment by the vendor and purchaser respectively of the mutual obligations imposed on them by the contract.[2]

(*a*) See Austin's Jurisp., 388, 1001-2; and per Grant, M. R., in Fludyer v. Cocker, 12 Ves., 27.

(*b*) Per Lord Westbury in Rose v. Watson, 10 H. L. C., 675. Cf. Edwards v. West, 7 Ch. D., 862, and supra, § 892.

[1] In equity, a vendee under a contract for the sale of lands, is considered as a trustee of the purchase money for the vendor, who is regarded as a trustee of the land for the former. The land is, in equity, the property of the vendee, who may dispose of it, or incumber it in like manner with land to which he has the legal title, subject to the rights of the vendor under the contract. Wing v. McDowell, Walk. Ch., 175.

[2] *Immediately upon the contract to purchase, an equitable estate arises in the vendee.*] "The doctrine of the English courts is necessary to give effect to the principle that, in equity, immediately on the contract to purchase, an equitable estate arises in the vendee, the legal estate remaining in the vendor for his benefit Qualified by the obligation to make compensation to any subsequent *bona fide* purchaser, who has paid only part of the consideration money, for all disbursements made before notice, the rule is every way consonant with correct principles. Such indemnity is protection *pro tanto*. The rule of law which deprives a subsequent purchaser who has contracted and accepted a conveyance, and paid part of the purchase money, in good faith of the fruits of his purchase, without indemnity, is extremely harsh, and often oppressive in its application. Mitigated by the obligation to make indemnity for payments

It follows (it is conceived) that upon the completion of the contract the condition is satisfied, and the vesting of the equitable as well as of the legal estate becomes absolute; but that upon the contract coming to an end in any other way than by completion the equitable estate revests in the vendor.(*c*)

§ **1366**. It is, then, important to inquire what are the mutual obligations of the parties to a contract of the kind under discussion. It is submitted that, in the absence of express stipulation, they are shortly as follows:—

§ **1367**. The vendor is bound—

1. To show a good title to the property contracted to be sold.
2. (a) To take reasonable care of the property, and
   (b) to pay the outgoings, until the purchaser takes, or ought to take, possession of it.
3. Upon being paid the purchase-money, and any interest on it that may have become payable,
   (c) to execute and procure the execution by all other necessary parties (if any) of a proper deed of conveyance vesting the legal estate in the purchaser, and
   (d) to put him in possession of the property.

§ **1368**. It is in regard of these or some of these obligations that the vendor has been said to be a constructive trustee, or a trustee *sub modo*, of the estate for the purchaser from the time when the contract is constituted.(*d*)

§ **1369**. On the other hand, the purchaser is bound—

1. As soon as either the vendor has shown a good title, or he (the purchaser) has accepted such title as the vendor shows or has,

(*c*) See per Plumer, M. R., in Wall v. Bright, 1 J. & W., 501. L. R. 5 H. L., 338, 349, 356; per Jessel, M. R., in Lysaght v. Edwards, 2 Ch. D., 506-510;
(*d*) See per Plumer, M. R., in Wall v. Bright, 1 J. & W., 500-503; Shaw v. Foster, per James, L. J., in Rayner v. Preston, 29 W. R., 550.

and expenditures before actual notice, its operation is nevertheless frequently inequitable. A party who seeks the enforcement of a rule of this nature against another who is innocent of actual fraud, must seek his remedy promptly. He may lose his right to specific relief against the land by laches, and be remitted to the unpaid purchase money as the only relief which will be equitable." Dupue, J., in Houghwout v. Murphy, 22 N. J. Eq., 531.

(a) to pay the purchase-money, and any interest on it that may have become payable, and
(b) to take possession of the property (that the vendor may be relieved from all future liabilities incident to the ownership.)

2. To bear the loss resulting from any accidental injury to the property happening after the contract has been constituted.(*e*)

In regard to the first of these obligations the purchaser has been said to be constructively a trustee of the purchase-money for the vendor.(*f*)

§ **1370**. In addition to the above obligations, the contract gives or may give rise to certain liens—of the vendor for unpaid purchase-money, and of the purchaser for the deposit or other portion of the purchase-money paid before completion, but these really result from the non-performance, in some respect, to the contract, rather than from the contract itself.

§ **1371**. If the foregoing statement of the obligations of the parties to the contract of the kind under discussion be correct, it follows that, where the contract contains no express stipulation on the point, the transfer of the possession of the estate from vendor to purchaser ought to be contemporaneous with the completion of the contract.

In practice, however, possession is often taken by the purchaser at an earlier date, in pursuance either of an express term of the contract, or of some extrinsic act of, or arrangement between, the parties.[1]

§ **1372**. Now it is obviously inequitable, in the absence of express and distinct stipulation, that either party to the contract should at one and the same time enjoy the benefits flowing from possession of the property and those flowing

(*e*) See Lysaght v. Edwards, 2 Ch. D., 507; and cf. Inst. iii 23, 3. Distinguish Counter v. Macpherson, 5 Moo. P. C. C. 63, supra, § 893.

(*f*) See the cases cited at the foot of § 1368 supra.

[1] *Purchase of property pendente lite.*] Where a party purchases property *pendente lite*, he is bound by the decree made against his vendor. It is not necessary that he should be made a party to the action. Sorrell v. Carpenter, 2 P. Wms., 482; Garth v. Ward, 2 Atk., 175; Gaskell v. Durdin, 2 B. & B., 169; Masson's App., 70 Pa. St., 27; Metcalf v. Pulnertorft, 2 V. & B., 205; Snowman v. Harford, 57 Me., 397.

from possession of the purchase-money. The estate and the purchase-money are things mutually exclusive. "You cannot," said Knight Bruce (then) V. C., in a case arising out of the sale of some slob lands in Chichester harbor, "have both money and mud." And so neither party can at the same time be entitled both to interest and to rents.(*g*)

§ **1373**. The general principles laid down in the preceding section of this chapter are of primary importance in determining

(1) The respective rights and liabilities of vendor and purchaser in regard of interest on the purchase-money and the rents and profits and outgoings of the estate:

(2) their respective rights and liabilities in regard of the deterioration of the estate after the constitution of the contract:

(3) the right of the vendor to have unpaid purchase-money paid into court.

The application of these principles to any particular case of contract may, however, be, and in practice usually is, modified by express stipulations embodied in the contract.

§ **1374**. With these preliminary observations it is proposed to consider the rather complicated questions which arise between vendor and purchaser in respect of rents, interest, outgoings, deterioration, and payment into court, under the following heads, viz.:

I. Where the vendor is in possession of the estate, either by receipt of the rents or by personal occupation.

II. Where the purchaser is similarly in possession of the estate.

1. *Where the vendor is in possession.*

§ **1375**. Where the contract fixes no time for the completion of the purchase, and is silent as to the rents and interest, there *primâ facie* the vendor, it is conceived, is entitled to the produce of the purchase-money, in the shape of interest, and the purchaser has a corresponding right to

(*g*) As to manorial fines, see Garrick v. Earl Camden, 2 Cox, 231; Cuddon v. Tite, 1 Giff., 395.

the produce of the estate, in the shape of tenants' rents or occupation rent, as from the time when the contract ought to have been completed and the transfer of possession to have taken place as a part of such completion.

§ **1376**. Where, as is usually the case, the contract fixes a time for completion, there *primâ facie*, and in the absence of stipulation, the time so fixed is the time from which the purchaser is liable to the payment of interest and is entitled to the rents. But this rule must be taken subject to several exceptions.(*h*)

§ **1377**. First, where the interest is much more in amount than the rents, and the delay in completion is clearly made out to have been occasioned by the vendor, the court, to prevent the vendor from gaining an advantage by his own wrong, gives him no interest, but leaves him in possession of the interim rents.(*i*) In such cases, the day at which the interchange of properties is treated as taking place is removed from the time fixed for completion to the time at which a good title is first shown.(*j*)[1]

§ **1378**. In one case, where a vendor had retained possession of the whole of the estate and of one-third of the purchase-money for fifteen years, and the delay was wholly due to his wrongful conduct, Plumer, M. R., not feeling himself justified in removing the time for the interchange of properties from the time fixed for completion, endeavored to meet the equity of the case by giving the purchaser the whole of the rents and interest on one-third of the rents in each year from the time of their accruing.(*k*)

§ **1379**. Secondly, where the title is made out in chambers, the day when the title is made out is the day on which the purchaser comes under an obligation to complete. Hence up to that day, the vendor is entitled to the rents, and the purchaser to interest on the deposit paid to the vendor; and from that day the purchaser takes the rents

(*h*) Consider Blnks v. Lord Rokeby, 2 Sw., 225, 226; Carrodus v. Sharp, 20 Beav., 58; Wells v. Maxwell (No 2), 32 Beav., 550; and see supra, §§ 1369, 1371.

(*i*) Esdaile v. Stephenson, 1 S. & S., 122.

(*j*) Jones v. Mudd, 4 Russ., 118; Paton v. Rogers, 6 Mad., 236. It seems previously to have been held that interest necessarily ran from the date for completion. See Wilson v. Clapham, 1 J. & W., 36; per Plumer, M. R., in Burton v. Todd, 1 Sw., 260.

(*k*) Burton v. Todd, 1 Sw., 255.

[1] See Sohier v. Williams, 2 Curtis C. C., 195; Springle v. Shields, 17 Ala., 295. It is to be said that whenever interest is recoverable at law, the courts of chancery allow it. Crocker v. Clements, 23 Ala., 296.

and pays the vendor interest on the unpaid balance of the purchase-money.(*l*)[1]

§ **1380**. Accordingly where a suit was instituted for the specific performance of a contract to buy a mill, and the decree was made in February, 1854, but a good title was not shown till December of that year, and a question arose as to who was to bear the expenses and outgoings belonging to the mill, and to the repairs and sustentation of the premises and the machinery, Lord Romilly, M. R., decided

(*l*) Pincke v. Curteis, 4 Bro. C. C., 333. Cf. Enraght v. Fitzgeral (a sale of a reversion), 2 Dr. & War., 43.

[1] *Who is liable for repairs and losses?*] By the contract of sale, the vendee was to cut no timber until the entire price had been paid. Held, that the vendee had an equitable right to such timber, and that his legal right dated from the time that he fulfilled, or offered to fulfill, the contract, notwithstanding he, or some one else, had wrongfully cut such timber. Where the loss is accidental, and happens entirely without the fault of the vendor after the property has been sold, such loss must be sustained by the vendee. Thompson v. Gould, 20 Pick., 134; Blem v. McClelland, 29 Mo., 304; Hill v. Cumberland Co., 59 Pa. St., 474. If the vendor cannot make a good title, and a loss occurs after a sale, the vendor must sustain the loss. Christian v. Cahill, 22 Gratt., 82. Where an accidental loss occurs pending a contract of sale, the true test as to which party should bear the sale is, who owned the property at the time? Willis v. Culver, 107 Mass., 514.

Improvements.] A purchaser of land was in possession, and, on a bill of specific performance, established his right against the vendor and a subsequent purchaser having notice. Held, that specific performance would be decreed, so as to give him his improvements. Boyd v. Vanderkemp, 1 Barb. Ch., 273. In a case where a vendee makes valuable improvements on the faith of a contract, but specific performance is denied him, compensation for such improvements may be made a charge on the land, unless the equity of a third person has intervened. Alday v. Echols, 18 Ala., 353; Hilton v. Duncan, 1 Coldw., 313; Evans v. Battle, 19 Ala., 389; Pitcher v. Smith, 2 Head, 208; Cox v. Cox, 59 Ala., 591; Williams v. Champion, 6 Ohio, 169. Story, J., said in Bright v. Boyd, 1 Story, 478: "It appears to me, speaking with all deference to other opinions that the denial of all compensation to such *bona fide* purchaser, in such a case, where he has manifestly added to the permanent value of an estate by his meliorations and improvements, without the slightest suspicion of any infirmity in his own title, is contrary to the first principles of equity. Take the case of a vacant lot in a city, where a *bona fide* purchaser builds a house thereon, enhancing the value of the estate ten times the original value of the land, under a title apparently perfect and complete. Is it reasonable or just that, in such a case, the true owner should recover and possess the whole, without any compensation whatever to the *bona fide* purchaser? To me it seems manifestly unjust and inequitable, thus to appropriate to one man the property and money of another who is in no default. The argument, I am aware, is, that the moment the house is built, it belongs to the owner of the land by mere operation of law, and that he may certainly possess and enjoy his own. But this is merely stating the technical rule of law, by which the true owner seeks to hold what, in a just sense, he never had the slightest title to—that is, the house. It is not answering the objection, but merely and dryly stating that the law so holds. But, then, admitting this to be so, does it not furnish a strong ground why equity should interpose and grant relief? I have ventured to suggest that the claim of the *bona fide* purchaser, under such circumstances, is founded in equity. I think it founded in the highest equity, and, in this view of the matter, I am supported by the positive dictates of the Roman law."

that these must be borne by the vendor up to the time at which the purchaser could prudently take possession, which is the time at which a good title is shown, and after that by the purchaser.(*m*)

§ **1381**. Where, however, the title has not been made out till after action brought, but the delay has arisen from the purchaser's raising other points which made the action necessary, then, the delay not being the fault of the vendor, interest will run from the day fixed for completion.(*n*)

§ **1382**. Thirdly, where the contract leaves the amount of the purchase-money to be subsequently ascertained, interest will not begin to run until the purchase-money is actually ascertained, notwithstanding that the time fixed by the contract for completion may have arrived before this is done. Thus in a case where the contract provided that the price should be determined by the award of a surveyor, the Court of Appeal in Chancery held that the vendor must pay the outgoings up to the date of the award, and was entitled to interest only as from that date, although the contract also contained a clause providing that the purchase-money paid at a time which, in the events which happened, arrived more than fourteen months before the award was made.(*o*)

§ **1383**. Fourthly, the purchaser was discharged from his *primâ facie* obligation to pay interest on the unpaid purchase-money where the purchase-money has been appropriated by him and has been unproductive,(*p*) and notice to this effect has been given by the purchaser to the vendor.(*q*) "Where nothing appears to occasion the delay," said Lord Cottenham, "the rule no doubt is, that the purchaser, who on the face of the contract is under the necessity of paying on a certain day, sets apart his money, and gives notice that it is ready, interest stops from that time, provided it be shown that he made no interest of it."(*r*) And even in contracts by railway companies taking land under their

(*m*) Carrodus v. Sharp, 20 Beav., 56.
(*n*) Monro v. Taylor, 3 Mac. & G., 713.
(*o*) Catling v. Great Northern Railway Co., 18 W. R., 121; 21 L. T. N. S., 17. In this case the possession appears to have been vacant during the period in dispute. Cf. Re Eccleshill Local Board, 13 Ch. D., 365.
(*p*) As to the result where the purchaser makes any profit on the appropriated money see infra, § 1424.
(*q*) Powell v. Martyr, 8 Ves., 146; Roberts v. Massey, 13 Ves., 561; Dyson v. Hornby, 4 De G. & Sm., 481; Howland v. Norris, 1 Cox, 59; Regent's Canal Co., v. Ware, 23 Beav., 575. Cf. Kershaw v. Kershaw (purchaser in possession), L. R. 9 Eq., 56.
(*r*) In De Visme v. De Visme, 1 Mas. & G., 352.

compulsory powers, where the owner makes default in completing the sale, interest will cease upon appropriation of the purchase-money, with notice that it is unemployed.(*s*)

§ **1384**. The general rule which we have been discussing may, of course, be excluded by express stipulation, as where conditions of sale reserved the rents to the vendor, which was held to exonorate the purchaser from the payment of interest on the unpaid purchase-money.(*t*)

§ **1385**. The contract very commonly contains a condition to the effect that the purchaser shall pay interest from the day appointed for completion from whatever cause the delay may arise. In a case decided in the year 1822, Leach, V. C., held that the mere fact of the delay having arisen on the part of the vendor did not release the purchaser from the obligation of such condition, and that accordingly he was bound to pay interest,(*u*) and in a case where the conditions of a sale under the court stipulated for payment of the purchase-money on a certain day, and that, if from any cause whatever it should not then be paid, interest should be paid at £5 per cent.; and there was great difficulty and delay on the vendor's part; Lord Langdale, M. R., ordered the payment of interest according to the contract, but without prejudice to any application for compensation.(*v*)

§ **1386**. However in another case, where there was a stipulation that if, by reason of any unforeseen or unavoidable obstacles, the purchase should not be completed by the day fixed, the purchaser should from that day pay interest at £5 per cent. on his purchase money and be entitled to the rents, and the vendor did not show a good title till long after the specified day, Leach, V. C., held that the stipulation would not make interest run before the time when a good title was shown, but would only affect its rate.(*w*)

§ **1387**. In the case of De Visme v. De Visme,(*x*) the effect of such conditions was very elaborately considered by Lord Cottenham, and his lordship held that a condition for

(*s*) Regent's Canal Co. v. Ware, 23 Beav., 575.

(*t*) Brooke v. Champernowne, 4 Cl. & Fin., 589, 611.

(*u*) Esdaile v. Stephensen, 1 S. & S., 122. See Lord St. Leonards' observations on this point, St. Leon. Vend., 529 et seq.

(*v*) Greenwood v. Churchill. 8 Beav., 413. In this case the purchaser had taken possession, but the only question that arose was as to interest.

(*w*) Monk v. Huskisson, 4 Russ., 121, n. This case seems irreconcileable with the same V. C 's decision in Esdaile v. Stephenson (1 S. & S., 122), supra, § 1385, and Lord St. Leonards thought it wrong. St. Leon. Vend., 521.

(*x*) 1 Mac. & G., 336. reversing the decision of Wigram, V. C., 13 Jur., 205.

the payment, in case of delay, of interest from the day appointed for completion, from whatever cause the delay might have arisen, did not apply to a case of the vendor's own default, but that in that case interest ran only from the time when a good title was shown. "There are two ways," said his lordship, "in which this case may be met in argument and upon principle. It may either be considered that that which has happened is not within the contract, that is, that the party never did mean to contract that he would pay interest, although he might be prevented from having the benefit of his purchase by the default of the vendor, and in this view it is the ordinary case of doing justice between the parties, an event having arisen which was not expressly provided for by the contract; or it may be considered that interest must be paid upon the purchase-money, according to the terms of the contract, although the vendor has not performed his part of the contract, and the purchaser has been thereby exposed to damage (the damage being the difference between the interest and the annual value of the property), and then, although this is a departure from the terms of the previous contract, which the court would not regard as a bar to decreeing a specific performance, yet that the court will in this case regard it, by giving to the purchaser compensation for the loss he has sustained by the non-performance of the whole contract by the vendor."(*y*) "My opinion," said his lordship, in conclusion,(*z*) "is, that the vendors being in default, the delay having been occasioned by their not performing their part of the contract, are not to exact from the purchaser the payment of interest until the time they shewed a good title on their abstract: the effect of that is to postpone the day agreed on for the completion of the contract, until the time when the vendors put themselves right, and showed their title to be good on the abstract. The result therefore is, that until that time there would be no demand to be made by the vendors for the payment, and therefore the interest, which was to stand in the place of that payment, had not commenced to run: it did run when they shewed a good title, and not before."

(*y*) 1 Mac. & G, 348.

(*z*) 1 Mac. & G., 353.

§ **1388**. The cases at common law, deciding that the exception in a charter-party as to pirates will not be held to exempt the owners from liability, where the ship has fallen into the hands of pirates by the master's negligence,(*a*) and that a stipulation in a bill of lading exempting the carrier from liability in respect of leakage and breakage will yet not comprise leakage and breakage caused by his negligence or that of his servants,(*b*) seem to furnish close analogies with the decision in De Visme v. De Visme.(*c*) It is in fact an instance of the general principle, that no man shall take advantage of his own wrong.

§ **1389**. Still, the decision in De Visme v. De Visme was an innovation, and the principles which it applied to conditions of the kind now under consideration have not been accepted by co-ordinate authority(*d*) as supplanting the former rule of the court—which was and, it is conceived, now is, that such conditions are to have effect given to them according to the natural and literal meaning of their words, except only where there is bad faith, vexatious conduct, or gross negligence—in other words, something amounting to *willful* default—on the part of the vendor, disentitling him, in the view of the court, to the benefit of the stipulation.(*e*)

§ **1390**. Therefore delay arising from mere accident, or from something which the vendor could not have guarded against, or from difficulties occasioned by the state of the title, is not enough to exempt the purchaser from the payment of interest in such cases, even though the difficulties may be such as to justify the purchaser in refusing to complete till they are removed.(*f*) Indeed it may fairly be said that the insertion of such a condition in a contract shows that the possilility of delay arising on the vendor's, no less than on the purchaser's part, is from the first contemplated by both parties, and that there can therefore be no hardship on the purchaser in holding him, subject

(*a*) Abbott on Shipping (12th ed.), 330; De Rothschild v. Royal Mail Steam Packet Co., 7 Ex., 736.

(*b*) Phillips v. Clark, 26 L. J. C. P., 168.

(*c*) 1 Mac. & G., 336

(*d*) Sherwin A. Shakspear, 5 De G. M. & G., 517 (varying S. C. 17 Beav., 267); Williams v. Glenton, L. R. 1 Ch., 200 (S. C. 34 Beav., 528). Consider Birch v. Podmore, St Leon. Vend., 521, 523, and Oxenden v. Lord Falmouth, id. 523. In Robertson v. Skelton (12 Beav., 363), Lord Langdale, M. R., simply obeyed Lord Cottenham's decision in De Visme v. De Visme, ubi supra.

(*e*) St. Leon. Vend., 523. See too Herbert v. Salisbury and Yeovil Railway Co., L. R. 2 Eq., 221; infra, § 1421.

(*f*) Sherwin v. Shakspear, Williams v. Glenton, ubi supra.

only to the admitted exceptions already mentioned, to the literal performance of the condition.

§ **1391**. In accordance with the rule stated in the last section but one, it has been held that the fact that a sufficient abstract is not delivered in time will not deprive the vendor of the interest which he has stipulated for:(*g*) so again in a case where there was a condition of the kind now under discussion, and delay arose from circumstances under which the court's approbation (which was necessary to the sale) was to be obtained, and neither party was to blame, the vendors were held to be entitled to interest by force of the condition, although the interest greatly exceeded the amounts of the rents of the land:(*h*) and to where, there being a similar condition in the contract, it became necessary, in order to make a good title, that a suit should be instituted to procure the rectification of the power under which the vendors sold, the purchaser was held bound to pay interest from the day named for completion.(*i*)

§ **1392**. The condition of course applies where the delay arises from an untenable objection taken on the part of the purchaser:(*j*) it operates also where the delay arises from the act of God, as the death of the vendor.(*k*)

§ **1393**. Whether, where there is a condition of this kind, a purchaser can nevertheless exempt himself from the payment of interest by specially investing the purchase-money, and giving the vendor notice that it has been thus appropriated to the purposes of the contract, seems to be at least doubtful.(*l*)

§ **1394**. The court will construe a condition fixing the time from which interest is to run in connection with another fixing the time for the delivery of the abstract: so that where there is a condition that the abstract shall be delivered by a certain day, and interest shall begin to run from another and subsequent day, and a perfect abstract is in fact not delivered till after the time fixed for that purpose, interest will not run from the day specified in that behalf, but from a day so long after the actual delivery of a

(*g*) Rowley v. Adams, 12 Beav., 476. See also Cowpe v. Bakewell, 13 Beav., 421; Dyson v. Hornby, 4 De G. & Sm., 481; Vickers v. Hand, 26 Beav., 630.

(*h*) Tewart v. Lawson, 3 Sm. & Gif., 307.

(*i*) Lord Palmerston v. Turner, 33 Beav., 524.

(*j*) Storry v. Walsh, 18 Beav., 559.

(*k*) Bannerman v. Clarke, 3 Drew., 632.

(*l*) Compare De Visme v. De Visme, 1 Mac. & G., 336, and Vickers v. Hand, 26 Beav., 630, with Williams v. Glenton, L. R. 1 Ch., 206, and Denning v. Henderson, 1 De G. & Sm., 689.

perfect abstract, as the day stipulated for the commencement of interest was after the day stipulated for the delivery of the abstract.(*m*)

§ **1395**. The amount on which the purchaser pays interest is the purchase-money less the deposit: and this applies even where the action may have been made necessary by the purchaser's conduct.(*n*)

§ **1396**. The vendor is not, it seems, generally liable to pay interest on the deposit, if the contract proceed.(*o*)

§ **1397**. The rate of interest usually allowed is four per cent.(*p*) But this, of course, may be varied by contract.(*q*)

In one case interest at the rate of five per cent was given, where the circumstances did not justify the delay in paying the money, the then Lord Chief Baron (sitting for Plumer, M. R.,) observing, "that he had always been of opinion, that a party withholding money from a person entitled to it, ought to pay to the person thus injured the interest which he might have made of it, if it had been paid before."(*r*) But this does not appear to be the rule of the court.(*s*)

§ **1398**. The fact that a purchaser has been making profit by his money whilst it is at his risk, and he is liable to interest, is no ground for increasing the rate of interest payable to the vendor.(*t*)

§ **1399**. Whenever a purchaser has to pay interest to the vendor, he is entitled, on making the payment, to deduct the income-tax on the amount of the interest.(*u*)

§ **1400**. The vendor in receipt of tenants' rents is generally charged only with the rents he has received, but he may, under certain circumstances, be charged with those which without his willful neglect or default he might have received.(*v*)

§ **1401**. In a case before Plumer, M. R., the vendor was so charged, where the circumstances which justified this charge appear to have been the facts that the rents had been allowed to run in arrear, and that it was through the

(*m*) Sherwin v. Shakspear, 5 De G. & M. G., 517, particularly 536.
(*n*) Bridges v. Robinson, 3 Mer., 694.
(*o*) St. Leon. Vend., 524.
(*p*) Calcraft v. Roebuck, 1 Ves. Jun., 221.
(*q*) e. g. Firth v. Midland Railway Co., L. R. 20 Eq., 100, 114.
(*r*) Burnell v. Brown, 1 J. & W., 175.
(*s*) St. Leon. Vend., 528.
(*t*) Acland v. Gaisford, 2 Mad., 28.
(*u*) See per Malins, V. C., in Crane v. Kilpin, L. R., 6 Eq , 335. See too Bebb v. Bunny, 1 K. & J., 216, cited infra, § 1446.
(*v*) Acland v. Gaisford, 2 Mad., 28; Phillips v. Silvester, L. R. 8 Ch., 173; Seton, 1305.

vendor's fault that the purchaser was not able safely to take possession.(*w*) But in a case where the vendor was similarly charged by Lord Romilly, M. R., the judgment was reversed, on appeal, by Knight Bruce and Turner, L. J. J., who decided that, in the absence of special circumstances, the vendor will not be charged with the rents which he might have received without willful default, and that he will not be subject to any inquiry unless there be evidence that he has in some way acted otherwise than a prudent owner would have done.(*x*)

§ **1402**. The vendor in possession is therefore not, as has sometimes been said, in the position of a bailiff at common law to the purchaser; for such a bailiff is answerable not only for his actual receipts, but for what he might have made of the lands without his willful default.(*y*)

§ **1403**. Inasmuch as the outgoings of an estate virtually represent the (or part of the) difference between the gross and the net rents, and may accordingly be regarded as included in the former, the liability to discharge them is, it is conceived, in the absence of stipulation, incident to and conterminous with the right to receive the rents. In a case where the conditions of sale of leaseholds stipulated that all outgoings up to the day of completion should be cleared by the vendors, it was held that an apportioned part, from the quarter-day last preceding to the day for completion, of the current ground-rent was an outgoing within the meaning of the condition, and must be paid or allowed to the purchaser by the vendors.(*z*)

§ **1404**. If, after the contract, and before the purchaser takes, or ought to take, possession of the estate, any deterioration take place by the conduct of the vendor or his tenants, he will be accountable for it to the purchaser.(*a*) "He is not entitled to treat the estate as his own. If he willfully damages or injures it, he is liable to the purchaser; and more than that, he is liable if he does not take reasonable care of it.(*b*)

(*w*) Wilson v. Clapham, 1 J. & W., 36.

(*x*) Sherwin v. Shakspear, 17 Beav., 267; S. C. 5 De G. M. & G., 517. See, also, Howell v. Howell, 2 My. & Cr., 478, and compare St. Leon. Vend., 519.

(*y*) Co. Litt., 172, a.; Wheeler v. Horne, Willes, 208.

(*z*) Lawes v. Gibson, L. R. 1 Eq., 135. Cf. Williams v. East London Railway Co., 18 W. R., 159; and see further, as to outgoings, Carrodus v. Sharp (20 Beav., 56, 58), cited supra, § 1380; Midgley v. Coppock, 40 L. T., 870.

(*a*) Foster v. Deacon, 3 Mad., 394. See too Counter v. Macpherson, 5 Moo. P. C. C., 83, supra, § 893.

(*b*) Per Jessel, M. R., in Lysaght v. Edwards, 2 Ch. D., 507.

§ **1405**. Where a purchaser had paid his money into court under an order, and he was considered entitled to compensation for deterioration, which had taken place while the vendors retained possession, he was allowed the amount out of his purchase-money, together with interest at four per cent, from the time when he paid it in, and the costs of the trial of an issue directed to ascertain the amount of damage.(*c*)

§ **1406**. Again, where vendors insisted on continuing in possession pending certain disputes between themselves and the purchaser, and allowed the property to fall into a state of dilapidation, Lord Selborne held that the purchaser must be allowed to set off against the interest payable by him the amount of rent which the vendors might, but for their willful neglect and default, have received, and also the amount of the deterioration,(*d*)

§ **1407**. In another case, where the purchaser (plaintiff) alleged that the vendors (defendants) had since the date of the contract let the property (an oil mill, with the plant and machinery,) to third parties, and that the plant was daily being deteriorated and worn out by the improper user thereof by the defendants' tenants, it was held that the plaintiff was entitled to discovery from the defendants of the names of the persons to whom, and the term for which, the property had been let.(*e*)

§ **1408**. The vendor's accountability for deterioration arises out of his constructive trusteeship(*f*) for the purchaser. Therefore, if the vendor of a farm subject to a yearly tenancy finds and knows, before the day for completion arrives, that it will be impossible to complete on that day, and that the tenancy will determine before actual completion, then, inasmuch as it is his duty, as a trustee for the purchaser, to keep the property in a proper state of cultivation, he ought to relet it on a yearly tenancy; unless the purchaser, being asked what he wishes to be done, is willing to run the risk of it being unlet, and will guarantee the vendor against any loss that may arise to him in case the purchase goes off.(*g*)

§ **1409**. In a case that came before the privy council, the

(*c*) Ferguson v. Tadman, 1 Sim., 530.
(*d*) Phillips v. Silvester, L. R. 8 Ch., 173.
(*e*) Dixon v. Fraser, L. R. 2 Eq., 497.
(*f*) See supra, § 1368.
(*g*) Earl of Egmont v. Smith, 6 Ch. D., 469, 475.

vendor of a coal mine, having, during delay of completion, worked the mine for his own benefit, was held bound to pay the purchaser the value *in situ naturali* of the coal taken, *i. e.* its market value at the place where it was to be sold, less the costs of severing it and taking it from the mine to that place.(*h*)

§ **1410**. On the other hand, the purchaser will have to bear the loss from deterioration in the following cases: First, where it occurs after the time at which he ought to have taken possession.(*i*)

§ **1411**. Secondly, where it occurs during the period in which the vendor is in possession, but is the result of accident, without the fault of the vendor: so that where during this period the vendor was, in consequence of such an accident, compelled to expend money on or in respect of the property, as in shoring it up, or removing rubbish which had fallen on a neighbor's property, the vendor was held entitled to have this repaid by the purchaser: but the court refused to make the purchaser pay the expenses of a reference to the master in relation to the repairs, though that had been proper for the protection of the trustees of the estate.(*j*)

§ **1412**. Thirdly, where the deterioration is due to the purchaser himself, the loss must fall on him though not in possession. Thus, where a purchaser agreed with a tenant of the estate that he should give up possession if the purchaser had a conveyance by a certain time, and the tenant, misconstruing the agreement, gave up possession though the purchaser had not the conveyance; the purchaser was held to be the innocent cause of the mischief, and so responsible for the deterioration which resulted.(*k*)

§ **1413**. The cases which arise where the vendor is himself in personal occupation of the estate correspond with those where he is in receipt of the rents, except that, instead of having to pay over the rents received from others, he will have to pay to the purchaser an occupation rent to be set upon the estate, himself receiving interest in return.(*l*)

§ **1414**. In a recent case, the contract having stipulated

(*h*) Brown v. Dibbs, 25 W. R., 776, following the principle of Jegon v. Vivian, L. R. 6 Ch., 742.

(*i*) Binks v. Lord Rokeby, 2 Sw., 222; Minchin v. Nann, 4 Beav., 332.

(*j*) Robertson v. Skelton, 12 Beav., 360.

(*k*) Harford v. Purrier, 1 Mad., 532.

(*l*) Dyer v. Hargrave, 10 Ves., 505.

that, from the day named for completion, the purchaser should receive "all rents and profits," the vendors, remaining in occupation of the property after that day, were held bound to pay a fair occupation rent for the interval which elapsed before the purchase was completed.(*m*)

§ **1415**. No such occupation rent, however, will be allowed where the purchaser ought under the contract to have taken possession, and the vendor has continued in possession, only by reason of the purchaser's wrongdoing.(*n*)

§ **1416**. Thus where the property (a tavern), was occupied by the vendor, a licensed victualler, for the purposes of his business, and the purchasers a railway company, having made default in payment of the purchase-money on the day named for completion, the vendor continued the business on his own behalf, but under great inconvenience, all his arrangements having necessarily to be made subject to determination on payment of the purchase-money, it was held that the purchasers were not entitled to any allowance by way of occupation rent.(*o*)

§ **1417**. Where the court fixes an occupation rent to be paid by the vendor, he will, it seems, be allowed to deduct the income tax on it as a "just allowance;" but the court will not insert any express provision on the point in the judgment.(*p*)[1]

(2) *Where the purchaser is in possession.*[2]

§ **1418**. It follows from the principles already stated and discussed in this chapter that generally, in the absence of

(*m*) Metropolitan Railway Co. v. Defries, 2 Q. B. D., 189; affirmed, id., 387.
(*n*) Dakin v. Cope, 2 Russ., 170, 181.
(*o*) Leggott v. Metropolitan Railway Co., L. R. 5 Ch., 716.
(*p*) Sherwin v. Shakspear, 5 De G. M. & G., 517, 532.

[1] Thomas v. Thomas, 1 Bibb., 219, is not an inapplicable case. B., there, agreed to surrender fifty acres of land to A., upon the conveyance from A. to B. of 250 acres. A. conveyed the 250 acres, but B. refused to give up the fifty acres. A. brought ejectment; B. his bill for an injunction. Held, that B. had no longer any claim to the fifty acres; and that an account of the rents and profits from the time of the commencement of the ejectment should be taken, and set off against the value of the improvements made by B.; it appearing that by agreement, all improvements were to be paid for. See Dike v. Greene, 4 R. I., 285.

[2] Purchasers in possession will be holden to pay interest, but will not be held liable for mesne profits. Portland v. Miller, 3 Hawks, 628; McKay v. Melvin, 1 Ired.'s Ch., 73; Rutledge v. Smith, 1 McCord's Ch., 399; Liddell v. Rucker, 13 La. An., 569; Bryant v. Booth, 30 Ala., 311; Stevenson v. Maxwell, 2 Sandf.'s Ch., 273; 2 Comst., 408; Seldon v. James, 6 Rand., 465; Sebree v. Harper, 4 Dana, 66; Oliver v. Hallam, 1 Gratt (Va.), 298; see Irick v. Fulton, 3 id., 193;

stipulation, a purchaser in possession of the estate which is the subject matter of the contract must pay interest on the unpaid purchase-money from the time when his possession under the contract commenced until completion.(*q*)

§ **1419**. The rule that the purchaser in possession shall pay interest on the unpaid part of the purchase-money will be applied even in cases where the delay arises from the neglect of the vendor, and the purchaser makes no actual profit out of the land,(*r*) "The act of taking possession," said Grant, M. R., "is an applied agreement to pay interest: for so absurd an agreement as that a purchaser is to receive the rents and profits to which he has no legal title, and the vendor is not to have interest, as he has no legal title to the money, can never be implied."(*s*)

§ **1420**. Accordingly where a purchase was to be completed by a given day, when the purchaser was to have possession, and it was provided that, if from any cause whatever the purchase-money should not be then paid, the purchaser should pay interest, and a delay of six months was occasioned, but innocently, by the vendor in not delivering proper abstracts, he was put to his election to

(*q*) See Supra, § 1372; and Fludyer v. Cocker, 12 Ves., 27; Binks v. Lord Rokeby, 2 Sw., 226; Neath New Gas Co. v Gwyn, W. N., 1873, 200; Ballard v. Shutt, 15 Ch. D., 122.

(*r*) Fludyer v. Cocker, 12 Ves., 25; Ballard v. Shutt, 15 Ch D., 122.

(*s*) Fludyer v Cocker, 12 Ves., 27, 28.

Walker v. Ogden, 1 Dana, 247. The fact that delay is caused by the neglect of the vendor is likewise held here not to alter the case. Brockenburgh v. Blyth, 3 Leigh, 619. And interest will be charged upon a purchaser, although the vendor has bound himself to make a good title before calling for the purchase money. Oliver v. Hallam, 1 Gratt. (Va.), 298. But a tender of the money will exonerate the vendee from the payment of interest; and on a bill for a specific performance, he will be obliged to accept without interest. January v. Martin, 1 Bibb, 586. And, again, where the purchaser of land was prevented from improving it by reason of a suit against the vendor to recover the land, the court refused to charge the purchaser with interest upon the purchase money pending the suit at law, though it was agreed between the vendor and purchaser that the improvements should be at the risk of the purchaser, in case the title should be questioned. Wightman v. Reside, 2 Dessau., 578. But in cases of this kind, where there has been no injury done to the vendee in the hindrance of improvements, and the adverse title is ultimately defeated, the vendee must pay interest. Nor is it sufficient, to excuse the payment of interest in such a case, that the vendee has been willing and ready to pay the principal during the time of litigation, unless it appear that the money lay uselessly by him, and unproductive, and that he gave notice to the vendor that it was so unproductive. Selden v. James, 6 Rand., 465; Breckenridge v. Hoke, 4 Bibb, 272; see Rutledge v. Smith, 1 McCord's Ch., 399. In regard to delay occasioned by the vendor, a distinction has been taken between sales of productive and unproductive property. Where the land is vacant, and consequently yields no rents or profits, it has been said that a purchaser, although in possession, shall not pay interest. Stevenson v. Maxwell, 2 Sandf.'s Ch., 273.

pay interest or give up rents, though notice had been given by the purchaser that the money was lying idle.(*t*)

§ **1421**. In a case decided by Lord Romilly, M. R., the contract provided that the purchasers should pay interest on the purchase-money at four per cent from the time of their taking possession until the 1st of July, 1858 (the day for completion), at five per cent from the last mentioned date until the 1st of January, 1859, and afterwards at eight per cent until payment, with a proviso that the purchasers should not be entitled to withhold payment of the purchase-money upon paying interest at the higher rates. The purchasers took possession before the end of 1857, but, without any misconduct on the vendors' part, completion did not take place until 1865. His lordship held that the stipulation for the payment of interest at the rate of eight per cent was a separate and distinct contract which the purchasers were bound to perform, and not as they contended, in the nature of a penalty to secure the completion of the purchase within a reasonable time.(*u*) The case well illustrates the principle that stipulations of this kind will have effect given to them according to their natural meaning.(*v*)

§ **1422**. Again where a purchaser under a decree accepted possession, and on a report of an objection returned possession, he was ordered to pay interest from time to time at which he took possession, or at which a title was shown under which he might safely have done so, and even for the time during which he returned the possession.(*w*)

§ **1423**. But where a purchaser had been let into possession at the intended time for completion, and afterwards, difficulties having without any fault on his part arisen to delay completion, paid the purchase-money into a separate account at a bank, and gave notice to the vendors that the money was appropriated to the purposes of the contract, and that he was ready to complete ; Lord Romilly, M. R., held that he was not chargable with interest after the date of his notice, but must pay to the vendors any interest he had received from the bank in respect of the sum paid in.(*x*)

(*t*) Cowpe v. Bakewell, 13 Beav., 421.
(*u*) Herbert v. Salisbury and Yeovil Railway Co., L. R. 2 Eq., 221.
(*v*) See supra, § 1389.
(*w*) Binks v. Lord Rokeby, 2 Sw., 222. See also Att.-Gen. v. Christchurch, 13 Sim., 214.
(*x*) Kershaw v. Kershaw, L. R. 9 Eq., 56. Distinguish Dickenson v. Heron, St. Leon. Vend., 516.

§ **1424**. For where the purchaser in possession makes any profit on any part of the appropriated purchase-money, he is discharged from the payment of interest only in respect of the purchase-money on which he has made no interest. Thus where a purchaser, on entering into possession, paid the money into his banker's, and gave the vendor notice that he was ready to invest in such manner as the vendor should require; and during the investigation of the title kept a balance at his banker's equal to the purchase-money, except on four days, when it was a little less; Leach, V. C., said it was clear that the purchaser had made some profit with the money, "first, because his balance was in a small degree and for a few days reduced below the amount of the purchase-money, but principally because the purchase-money supplied the place of that balance which he must otherwise have maintained at his banker's:" he therefore directed an inquiry as to the average balance which the purchaser had maintained at his broker's for the three years preceding the purchase, and the average balance during the period of the investigation of the title, and declared that in respect of the difference between those balances he was not chargeable with interest on his purchase-money.(*y*)

§ **1425**. So strongly does the court hold to this principle, that a purchaser in possession shall pay interest on the unpaid purchase-money, that it will look at any contract which appears to prevent the application of this rule by the light of this general principle of justice, and, it seems, refuse execution of it where it grossly violates this principle: for "a court of equity interposes only according to conscience."(*z*)

§ **1426**. So that where a contract stipulated that the interest on the remainder of the purchase-money should not commence till lady-day next, in case the title should be perfected and the assurances executed at that time; and if not, then should commence on the execution of such assurances; and the purchaser was let into possession under a stipulation in the contract to that effect, but the assurances were not executed for forty years; the House of Lords held

(*y*) Winter v. Blades, 2 S. & S., 393. Lord St. Leonards doubted the correctness of this decision. St. Leon. Vend., 514.

(*z*) Per Lord St. Leonards in Birch v. Joy, 3 H. L. C., 598.

that the purchaser's exemption from interest, though permissible if the contract had been speedily executed, would not, under such circumstances and with such length of time, be enforced by the court of equity.(*a*)

§ **1427**. In a recent Irish case, the purchaser, who had been allowed to go into possession without paying the purchase-money, and had afterwards been forcibly dispossessed, sued for specific performance and damages. He was charged with interest for the period during which he was in possession, and, as from the time when the vendor retook possession, interest was not charged against the purchaser nor the rents against the vendor; and no damages were given.(*b*)

§ **1428**. Where a corporation, acting under some special act of Parliament incorporating the lands clauses act, 1845, takes possession of land by virtue of its statutory powers before the price had been ascertained, the vendor is generally entitled to interest on the purchase or compensation moneys from the date of the taking possession.(*c*)

§ **1429**. But in a case where a local board compulsorily purchased lands which were subject to tenancies, and the price of the landlords' [vendors'] interest was ascertained by the verdict of a jury, the court held that interest was payable by the purchasers from the day of the verdict, notwithstanding that they could not and did not obtain actual possession of the property for sometime afterwards; but it was at the same time held that, if the vendors had received any rents since the verdict, the amount of those rents would be deducted from the interest.(*d*)

§ **1430**. In one case, where the purchaser had been let into possession under the contract, and objected to the title, he was allowed to remain in possession on payment of an occupation rent: but the case seems to have been one of arrangement, not of strict right.(*e*)

§ **1431**. In sales of reversionary estates, the purchaser cannot, of course, be let into actual possession or receipt of the profits of the estate purchased. It becomes, therefore, necessary to inquire from what period he is to be treated as if he were in possession, so as to render him liable to the

(*a*) Birch v. Joy, 3 H. L. C., 565.
(*b*) Johnston v. Johnston, I. R. 3 Eq., 328.
(*c*) Rhys v. Dare Valley Railway Co., L. R. 19 Eq., 93; Firth v. Midland Railway Co., L. R. 20 Eq., 100.
(*d*) Re Eccleshill Local Board, 13 Ch. D., 365. Cf. Catling v. Great Northern Railway Co., 18 W. R., 121; 21 L. T. N. S., 17.
(*e*) Smith v. Lloyd, 1 Mad., 83; S. C. s. n. Smith v. Jackson and Lloyd, 1 Mad., 618.

payment of interest on his unpaid purchase-money: for the wearing away of the lives, or of the time after which the reversion will vest in possession, is justly considered equivalent to possession, and as creating in the purchaser a liability to pay interest.(*f*)

§ **1432**. The purchaser of such an estate pays interest from the time at which he became by law entitled to receive the rents,(*g*) which is *primâ facie* the time fixed for completion of the contract;(*h*) or, where the contract specifies no time for completion, the time at which a good title was first shown or the title was accepted.(*i*) This may of course be modified by contract: so where the contract stipulated that the rents should belong to the purchaser only from the time the contract was completed, the vendor was held not entitled to claim interest on the unpaid part of the purchase-money. (*j*)

§ **1433**. In cases of sales of reversions under the court, interest will, it seems, run from the time when the chief clerk's certificate of the result of the sale becomes binding.(*k*) But where a time is specified at which the money ought to be paid into court, that, and not the confirmation of the sale, will, it appears, be the time from which interest run; as in the case of an estate in possession that would be the time at which a purchaser would be entitled to enter into the receipt of the rents. So where the 25th of December, 1849. was appointed for the payment of the money into court, but the abstract was delivered in September, 1851, and a good title was not made out till March, 1852, interest was directed to be paid from the 25th December, 1849.(*l*)

§ **1434**. Possession of the estate and of the purchase-money being, as we have seen,(*m*) mutually exclusive, the vendor is generally entitled to call on a purchaser in possession to pay the purchase-money into court.

§ **1435**. Where the purchaser is in possession, and the

(*f*) See, in addition to the subsequent cases, Davy v. Barber, 2 Atk., 489; Robertshaw v. Bray, 14 L. T., 101, 12 Jur., 224.

(*g*) Champernowne v. Brooke, 3 Cl. & Fin., 4 (overruling Blount v. Blount, 3 Atk., 636).

(*h*) Bailey v. Collett, 18 Beav., 179; Wallis v. Sarel, 5 De G. & Sm., 429; Davy v. Barber, 2 Atk., 489; Owen v. Davies, 3 Atk., 637.

(*i*) Enraght v. Fitzgerald, 2 Dr. & War., 43, reversing Lord Plunkett's decision S. C. 2 Ir. Eq. R., 87, that interest should run from the date of the report of good title; and see supra, § 1375.

(*j*) Brooke v. Champernowne, 4 Cl. & Fin., 589; and see Weddall v. Nixon, 17 Beav., 160.

(*k*) Ex parte Manning, 2 P. Wms., 410. Cf. Seton, 1397, 1398; Dart, Vend. (5th ed.), 1200. See, also, Child v. Lord Abingdon, 1 Ves, Jun., 94; Trefusis v. Lord Clinton, 2 Sim., 359.

(*l*) Wallis v. Sarel, 5 De G. & Sm., 429.

(*m*) Supra, § 1372.

vendor has disclosed such a title as the purchaser ought to accept, the vendor's right thus to proceed is clear. And the court will pursue this course where the purchaser in possession admits a good title, though he may claim the right to object, it not having been approved by counsel.(*n*)

§ **1436**. On the other hand it is a general rule, that where it is through the laches of the vendor that the title remains incomplete, the court will refuse an application for the payment of the purchase-money into court.(*o*)

§ **1437**. But where the want of a good title being shown is not from the default of the vendor, the court will, it seems, put the purchaser to his election, either to pay in his purchase-money or to give up possession.

§ **1438**. Thus, in a case before Lord Eldon, where the purchaser was let into possession, both parties acting in the confidence that the title would soon be made out, and that confidence was "not (to use his lordship's words) made good, and that was a surprise upon both," his lordship expressed the opinion that the purchaser should be put to his election, either to give up possession or to pay the money into court: but on a subsequent day his lordship said only that the purchaser ought, at least, to pay interest on his purchase-money; and the point was ultimately settled by agreement between the parties.(*p*) And notwithstanding some doubts cast upon the wisdom of this judgment in a subsequent case by Plumer, V. C., who considered it to be "the imprudence of the vendor in letting the vendee into possession before the questions upon the title were disposed of,"(*q*) the court will generally put a purchaser in possession, where the title has not been made out, to his election, either to pay in the purchase-money or to give up possession;(*r*) and the court did so in one case where it was part of the contract that £5,000, part of the purchase-money (£6,300), should be secured by a mortgage of the estate.(*s*) In such cases(*t*) two months, and in an-

(*n*) Crutchley v. Jerningham, 2 Mer., 502.
(*o*) Fox v. Birch, 1 Mer., 105.
(*p*) Gibson v. Clarke, 1 V. & B., 500.
(*q*) Clarke v. Elliott, 1 Mad., 607.
(*r*) Clarke v. Wilson, 15 Ves., 317; Smith v. Lloyd, 1 Mad., 83; Wickham v. Evered, 4 Mad., 53; Tindal v. Cobham, 2 My. & K., 385. See also King v. King 1 My. & K., 442; and Curling v. Austin, 2 Dr. & Sm., 129, 139 (in which case the purchaser had been in possession without receipt of the rents.)
(*s*) Younge v. Duncombe, Yon. 275.
(*t*) Younge v. Duncombe, Tindal v. Cobham, Curling v. Austin, ubi supra.

other(*u*) one month, having been allowed the purchaser to elect whether of the alternatives to accept.

§ **1439**. Where the contract allows possession to be taken before the completion of the title, the court will not generally order the payment of the purchase-money into court on the score of possession.(*v*)

§ **1440**. Thus, where by the contract the purchasers, a railway company, were to be at liberty to take possession on depositing a specified sum of money in a bank, and they duly made the deposit and entered into possession of the land and made their railway over it, though they afterwards for a long time neglected to complete, the Court of Appeal in Chancery held that the vendor was not entitled, on interlocutory motion, to have the purchase-money paid into court.(*w*)

§ **1441**. But in another railway case, where the purchasing company were by the contract allowed to take possession, but the contract also contained a clause providing that the vendors should nevertheless retain their lien for the unpaid purchase-money, and all rights and remedies incident to such lien, Kindersley, V. C., held that the fact of the company having been let into possession did not prevent the vendors from applying to have either payment into court of the unpaid balance of the purchase-money or delivery up of possession, and he ordered such payment or delivery to be made within a month, on the terms, however, that if possession were delivered up, the vendors should, within a fortnight after such delivery, pay into court the instalment of the purchase-money which they had already received.(*x*)

§ **1442**. If the purchaser happens to be in possession under some other title than the contract, this is a circumstance against calling for the payment of the purchase-money into court; as where the purchaser was in possession not under the contract for sale, but as tenant to the vendor at the time of the purchase;(*y*) and where the purchaser was

(*u*) Wickham v. Evered, ubi supra.

(*v*) Morgan v. Shaw, 2 Mer., 138; Gibson v. Clarke, 1 V. & B., 500; Gell v. Watson, 3 Mad., 225.

(*w*) Pryse v. Cambrian Railway Co., L. R. 2 Ch., 444. Consider Tomlinson v. Manchester and Birmingham Railway Co., 2 Rail. C., 104 (where the acts relied on were done under a mistake); Pell v. Northampton and Banbury Junction Railway Co., L. R. 2 Co. 100, 102; Capps v. Norwich and Spaulding Railway Co., 2 N. R., 51, where Kindersley, V. C., seems to have considered that the company had bought the right to possession by paying part of the price.

(*x*) Cooper v. London, Chatham and Dover Railway Co., 14 W. R., 985.

(*y*) Bonner v. Johnston, 1 Mer., 366.

a tenant in common with the vendor, and had with his consent been in receipt of the rents of the whole.(*z*)[1]

§ **1443**. In a case where the contract of which the plaintiff sought specific performance was that, when a house of the plaintiff should be completed, he would grant to the defendant and the defendant would accept a lease of it for twenty-one years, and the defendant took possession of the house before it was completed, and occupied it for a year, but refused to pay rent; a motion by the plaintiff that the defendant should be ordered to pay the year's rent into court was refused, on the ground that the money asked for was no part of the contract, nor was the defendant in possession under it.(*a*)

§ **1444**. Where the mere taking possession of the property does not furnish any ground for ordering the payment of the money into court, the order will yet be made, and without giving the option of delivering up possession, where the purchaser in possession commits acts of ownership, particularly acts occasioning the deterioration of the property;(*b*) and this, even though the title may not have been made out,(*c*) or the purchaser may be in possession according to the terms of his contract.(*d*) The ground of this proceeding is that by such acts the purchaser is altering the

(*z*) Freebody v. Parry, Coop. 91; cf. Walters v. Upton, Coop. 92, n., which appears to depend on the circumstances stated by Sir Samuel Romilly, arguendo, in the case to which it is a note.

(*a*) Faulkner v. Llewellin, 31 L. J. Ch., 549.

(*b*) Pope v. Great Eastern Railway Co., L. R. 3 Eq., 171.

(*c*) Bonner v. Johnson, 1 Mer., 366.

(*d*) Dixon v. Astley, 19 Ves., 564; S. C., 1 Mer., 133, 378, n.

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[1] *Tenants in common, or joint tenants.*] "Where two devisees are in possession, under an imperfect title derived from their common ancester, there would seem naturally and equitably to arise an obligation between them, resulting from their joint claims and community of interest, that one of them should not effect the claim to the prejudice of the other. It is not consistent with good faith, nor with duty which the connection of the parties as the claimants of a common subject created, that one of them should be able, without the consent of the other, to buy in an outstanding title and appropriate the whole subject to himself and thus undermine and oust his companion. It would be repugnant to a sence of refined and accurate justice. It would be immoral, because it would be against the reciprocal obligations to do nothing to the prejudice of each others equal claim which the relationship of the parties as joint devisees created. Community of interest produces a community of duty, and there is no real difference on the ground of policy and justice, whether one co-tenant buys up an outstanding incumbrance or an adverse title to dissuage and expel his co-tenant. It cannot be tolerated when applied to a common subject in which the parties had equal concern, and which created a moral obligation to deal candidly and benevolently with each other, and to create no harm to their joint interest." Kent, Ch., in Horne v. Fonda, 5 John.'s Ch., 388, 407; see, also, Carter v. Horne, 1 Eq. Abr. (7 Pl.), 13; Fawcett v. Whitehouse, 1 R. & M., 132; Barton v. Wookey, 6 Mad., 367.

property which constitutes the security of the vendor for his purchase-money, and diminishing the value of the vendor's lien on the estate.(*e*)

§ **1445**. Hence, acts of ownership which are clearly an improvement to the estate will not support such an application to the court :(*f*) and hence, also, acts which may not show that the occupier considers himself the owner, and so will not justify a decree of specific performance against him without further investigation of the title, may yet be a ground for an order to pay the money into court, and the appointment of a receiver ; so that in one case stubbing up an osier-bed, levelling the land and filling up a pond, were held to justify an order for payment and the appointment of a receiver, but a reference of title was at the same time made.(*g*) In another case, Lord Eldon took into consideration the unreasonable delay which had been caused by the purchaser in possession as well as his acts of ownership.(*h*)

§ **1446**. Although, as we have seen, where delay occurs in the completion of a contract and the purchase-money bears interest, the purchaser paying such interest to the vendor is entitled to deduct the income-tax on the amount of the interest,(*i*) where the purchase-money is paid into court, this deduction is not allowed : because payment into court is not payment to the party as against whom the purchaser is entitled to deduct the tax. However the purchaser may, it seems, apply for the deduction when the money is paid out of court.(*j*)

§ **1447**. The order for payment into court may be made on motion,(*k*) and, if circumstances justify it, before the delivery of the defense.(*l*) In the Court of Chancery the order might be made before answer,(*m*) even though the defendant had filed no affidavit so as to bring the merits before the court,(*n*) and though the acts of ownership relied on were not stated in the bill ;(*o*) and the facts necessary to

(*e*) Cutler v. Simons, 2 Mer., 106, where a list of acts upon which such orders had been made is given. See, also, Pope v. Great Eastern Railway Co., L. R. 3 Eq., 171, and Ballard v. Shutt, 15 Ch. D., 122.
(*f*) Bramley v. Teal, 3 Mad., 219.
(*g*) Osborne v. Harvey, 1 Y. & C. C. C., 116.
(*h*) Burroughs v. Oakley, 1 Mer., 52, 376, n.
(*i*) Crane v. Kilpin, L. R. 6 Eq., 339, supra, § 1399; Bebb v. Bunny, 1 K. & J., 216.
(*j*) Bebb v. Bunny, 1 K. & J., 216.
(*k*) Tindal v. Cobham, 2 My. & K., 385; Wickham v. Evered, 4 Mad., 53. See, also, Buck v. Lodge, 18 Ves., 450; and Ord. XL. r. 11, quoted supra, § 1334.
(*l*) Bonner v. Johnston, 1 Mer., 366; Dixon v. Astley, 1 Mer., 133.
(*m*) e. g. Cooper v. London, Chatham, and Dover Railway Co., 14 W. R , 985.
(*n*) Blackburn v. Stace. 6 Mad., 69.
(*o*) Cutler v. Simons, 2 Mer., 103. See now Ord. XIX. rr. 4, 9, 17, 18, 20; Ord. XXIX. r. 11.

support such an application might be supplied by affidavit, whether stated in the bill and not admitted by the answer,(*p*) or not stated in the bill.(*q*)[1]

§ **1448**. Where an order for payment into court has been opposed, and the money is in the hands of a stakeholder who afterwards absconds, the loss has been held to fall on the party who opposed the order.(*r*)

§ **1449**. It has been decided that, when interest is payable by a purchaser in possession, the time at which it first becomes due within the meaning of the 42d section of the Statute of Limitations (3 and 4 William IV, c. 27) is the time when the purchase-money becomes actually payable, though it (the interest) may have to be calculated from a much earlier date. In the case referred to the contract, made in March, 1811, stipulated that the purchase-money should be paid on the following thirteenth of May, but the transaction remained uncompleted for upwards of forty years under circumstances which kept alive the vendor's right to the purchase-money: it was held that all the arrears of interest from the 13th of May, 1811, were recoverable by the persons representing the vendor.(*s*)

(*p*) Boothby v. Walker, 1 Mad., 197.
(*q*) Crutchley v. Jerningham, 2 Mer., 502.
(*r*) Fenton v. Browne, 14 Ves., 144; Burroughs v. Oakley, 1 Mer., 52.
(*s*) Toft v. Stevenson, 5 De G. M. & G., 735. Cf. S. C., s. n. Toft v. Stephenson, 7 Ha., 1; 1 De G. M. & G., 28.

[1] *Tender by payment into court.*] In a case where the payment of a sum of money is a condition precedent, and a tender of performance has been made, this entitles the vendee to performance on the part of the vendor. The money need not be brought into court until the vendor demands it. Washburn v. Dewey, 17 Vt., 92. Where money has been conditionally paid into court, the party who denies the existence of the contract upon which it is paid, has no claim upon such money. Lynch v. Jennings, 43 Ind., 276; Soule v. Holdridge, 25 Ind., 119. Where the vendor voluntarily permitted the vendee to take possession without any stipulation about paying the purchase money, such vendee cannot be compelled to pay the money into court, before the completion of the title. Clark v. Elliot, 1 Mad., 606. In Binns v. Mount, 28 N. J. Eq., 24, a non-resident purchaser having brought his action for the specific performance of the agreement, although he was not in possession of the property, was required to pay the purchase money into court.

CHAPTER VI.

OF THE DEPOSIT.

§ **1450**. It is common on sales of real estate for the purchaser to pay to the vendor at the time of the contract a portion of the purchase-money by way of part payment. This is very generally, or perhaps almost universally, the practice in cases of sales by auction:(*a*) it is the exception in cases of sales by private contract.

§ **1451**. In many other cases payments are made to the vendor by way of instalment or part payment. Where without any default on the part of the purchaser the contract fails, this money should be repaid.[1]

§ **1452**. Furthermore, it is clear that the payment of this money to the vendor or his agent creates a lien for the amount paid on the vendor's interest in the land. "There can be no doubt, I apprehend," said Lord Cranworth, addressing the House of Lords, "that when a purchaser has paid his purchase-money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as the owner of the estate. When, instead of paying the whole of his purchase-money, he pays a part of it, it would seem to follow, as a necessary corollary, that, to the extent to which he has paid his purchase-money, to that extent the vendor is a trustee for him; in other words, that he acquires a lien, exactly in the same way as if, upon the payment of part of the purchase-money,

(*a*) Note that where, on a sale by auction, there is a condition for the forfeiture of the deposit if the purchase be not completed within a certain time, the court will generally relieve against the lapse of time. See per Lord Redesdale in Lennon v. Napper, 2 Sch. & Lef., 684.

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[1] *Effect of part payment on the rights of the purchaser.*] For an instructive case, see Keegan v. Williams, 22 Iowa, 378.

Rise in value, notice that contract was at an end.] Real estate which had been sold, was likely to rise in value within a few days; the vendor gave notice on Saturday that the contract was at an end, and would not be renewed, except for a greater price. The vendee made no objection, and the vendor sold to a third party on the following Tuesday. Held, that the original vendee had no remedy, and that his action for specific performance would be dismissed. Hawley v. Jelley, 25 Mich., 94.

the vendor had executed a mortgage to him of the estate to that extent."(*b*)

§ **1453**. In Rose v. Watson,(*c*) W., having successfully resisted a vendor's suit for the specific performance of a contract to purchase a building estate on the ground of the vendor's representations not having been fulfilled, filed a bill to enforce his lien on the estate for deposit and instalments of purchase-money with interest. The House of Lords, affirming the decision of Kindersley, V. C., held the plaintiff entitled to such lien and interest in priority to persons to whom, after the contract, the vendor had mortgaged the property; and that although some of the plaintiff's payments were made after he had notice of the mortgage.

§ **1454**. The lien is not strictly confined to a case of simple purchase: it extends to the case of a lease, and entitles an intended lessee who has entered under the contract and expended money to a lien on the lessor's interest:(*d*) it extends, too, to a sub-purchaser: so that where A. sold to B. and received part payment from him, and B. sold to C. and received part payment from him, C. was held entitled to a lien on B.'s interest in A.'s estate.(*e*)

§ **1455**. This lien, in the case of a purchaser, extends to (1) all instalments of the purchase-money;(*f*) (2) interest thereon at four per cent per annum;(*g*) (3) sums paid under the contract as interest on the unpaid purchase-money; (4) interest thereon;(*h*) and (5) the costs of an unsuccessful action by the vendor against the purchaser.(*i*)

§ **1456**. It may be observed, in passing, that a vendor under the Lands Clauses Consolidation Act, 1845, has no corresponding lien on the land sold for the costs of an arbitration payable to him by the company.(*j*)

§ **1457**. The lien can, no doubt, be enforced in precisely the same way as a vendor's lien for unpaid purchase-money, and under the present practice(*k*) there can, it is conceived,

(*b*) Rose v. Watson, 10 H. L. C., 683, 684. See, too, per Lord Westbury, in S. C., 678.

(*c*) 10 H. L. C., 672. See, also, Wythes v. Lee, 3 Drew, 396., where the earlier cases are considered.

(*d*) Middleton v. Magnay, 2 H. & M., 233

(*e*) Aberaman Ironworks v. Wickens, L. R. 4 Ch., 101.

(*f*) Bryant v. Busk, 4 Russ., 5; Hick v. Phillips, Prec. in Ch., 575. See Graves v. Wright, 2 Dr. & War., 79; cf. Myycock v. Beatson, 13 Ch. D, 386.

(*g*) Lord Anson v. Hodges, 5 Sim., 227; Webb v. Kirby, 7 De G.M. & G., 376; Wythes v. Lee, 3 Drew., 396.

(*h*) Rose v. Watson, 10 H. L. C., 672.

(*i*) Middleton v. Magnay, 2 H. & M., 233; Turner v. Marriott, L. R. 3 Eq., 744

(*j*) Earl Ferrers v. Stafford and Uttoxeter Railway Co., L. R. 13 Eq., 524; Walker v. Ware, Hadham and Buntingford Railway Co., L. R. 1 Eq., 195; Gould v. Staffordshire Potteries Waterworks Co., 5 Ex., 214.

(*k*) See, especially, Jud. Act, 1873, s. 24, subs. 7.

be no difficulty in giving full effect to the purchaser's rights. For—

(1) If the vendor be plaintiff, the purchaser (defendant) resisting specific performance may deliver a counterclaim, asking for a personal order for repayment of the amount paid and interest, and for a declaration of his lien on the plaintiff's interest for those sums and costs; and on the plaintiff's action failing, such relief would clearly be granted to the defendant.

(2) If the purchaser be plaintiff, he will frame his claim in the alternative, asking for specific performance or the repayment of the amount paid and the enforcement of his lien, and obtain relief accordingly.

§ **1458**. Where the deposit which the purchaser seeks to recover by action is in the hands of the auctioneer at the time when the action is commenced, and is a large sum, the purchaser may properly make the auctioneer a party to the action. If the sum is small, the auctioneer ought not to be made a party unless and until he has refused to pay it into court.(*l*)[1]

§ **1459**. In a recent case, where the contract was for the sale of a term of twelve and a half years in a public house (a going concern), and the abstract showed that the lessors had a right to determine the lease at the end of five years, it was held that the purchaser was entitled to rescind the contract, and sue for the repayment of the deposit and interest, without waiting even until the day fixed by the contract for the transfer of possession.(*m*)

§ **1460**. On the other hand, where the purchaser, after making a payment by way of deposit, unjustifiably repudiates the contract, or it in any other way goes off through his default, the vendor is, in the absence of stipulation on the point, entered to retain the money, treating it as having been paid to him as a guarantee for the purchaser's performance of the contract.(*n*)

(*l*) Earl of Egmont v. Smith, 6 Ch. D., 469; Cf. Yates v. Farebrother, 4 Mad., 239

(*m*) Weston v. Savage, 10 Ch. D , 736.

(*n*) Ex parte Barrell, L. R. 10 Ch., 512; Depree v. Bedborough, 4 Giff., 479; Keil v. Nokes, 14 W R., 908; cf. Moeser v. Wisker, L. R. 6 C. P , 120, and distinguish Casson v. Roberts, 31 Beav., 613. See too Essex v. Daniell, L. R 10 C. P., 538 (where there was a condition for forfeiture of the deposit); and as to relief against forfeiture of the deposit, see Lennon v. Napper, 2 Sch. & Lef., 684; Moss v. Matthews, 3 Ves , 279.

[1] It is obvious that a covenant to convey, in many instances, carries with it an obligation to refund. Pratt v. Law, 9 Cranch, 456; Pratt v. Campbell, id., 456; see Fox v. Longly, 1 A. K., Marsh., 388; Campbell v. Bealor, 3 Bibb, 300.

§ **1461**. But conditions for forfeiture of the deposit to the vendor,(*o*) or its repayment without interest or costs, (*p*) cannot be enforced by a vendor who is unable to make a good title.

§ **1462**. It may be convenient briefly to advert to the jurisdiction in respect of part payment of the purchase-money and the lien for it under the practice of the Court of Chancery.

§ **1463**. Where the vendor was the plaintiff, and failed in his suit for specific performance, the court might dismiss the bill, and order the plaintiff to return the deposit with interest at four per cent.:(*q*) or it might declare the defendant entitled to a lien for these amounts and the costs of suit, and dismiss the bill subject to this declaration.(*r*)

§ **1464**. But the proceeding of the court in this respect was discretionary, and depended on circumstances: for the court, by dismissing the bill, sometimes meant to leave the parties to their remedies at common law, in which case it did not order the return of this deposit.(*s*)[1]

§ **1465**. With regard to the power of the Court of Chancery to give the purchaser relief in respect of his deposit where he was the plaintiff, and specific performance was refused, considerable variation took place.(*t*) But in Todd v. Gee,(*u*) Lord Eldon, after fully considering the earlier cases, held that, except in very special cases, a bill could not be filed asking the performance of a contract, or, in the alternative, an issue or an inquiry with a view to damages. This decision was followed in many subsequent cases.(*v*)

§ **1466**. But if the plaintiff prayed not the mere repayment of money but a lien upon the land, he was seeking for

(*o*) Want v. Stallibrass, L. R. 8 Ex., 175.
(*p*) McCulloch v. Gregory, 1 K & J., 286, 295.
(*q*) Lord Anson v. Hodges, 5 Sim., 227; Webb v. Kirby, 7 De G M. & G. 376; Sheard v. Venables, 15 W. R, 1166.
(*r*) Turner v. Marriott, L. R. 3 Eq, 744.
(*s*) Southcomb v. Bishop of Exeter, 6 Ha., 225; Rede v Oakes, 2 De G. J & S., 518
(*t*) Denton v. Stewart, 1 Cox, 258; S. C., 17 Ves, 276, n.; Greenaway v. Adams, 12 Ves., 395; Gwillim v. Stone, 14 Ves., 128. See also Blore v. Sutton, 3 Mer, 237, 248.
(*u*) 17 Ves., 273
(*v*) Kendall v. Beckett, 2 R. & M., 88; Jenkins v. Parkinson, 2 My. & K, 5; Van v. Corpe, 3 My. & K., 269; Sainsbury v. Jones, 2 Beav., 462; S. C. 5 My. & Cr., 1; Williams v. Edwards, 2 Sim., 78.

[1] A vendee of land, in possession, paid part of the purchase money under the contract, but on being sued for the residue by the vendor, set up in answer the statute of frauds, and defeated the action. Held, that this was an abandonment of the contract, which precluded him from a decree of specific performance, and entitled him to a restitution of his purchase money. Payne v. Graves, 5 Leigh, 561.

equitable and not merely legal relief, and he could maintain his bill for specific performance, or, in the alternative, for a lien on the vendor's interest and the sale of it accordingly ;(*w*) or he might enforce his lien by means of a supplemental bill.(*x*)

§ **1467**. Where a contract was rescinded on the ground of fraud, surprise, or misrepresentation, and a deposit had been paid, it was within the jurisdiction of the court, when decreeing rescission, also to order the deposit to be returned.(*y*)[1]

(*w*) Wythes v. Lee, 3 Drew., 396, compromised on appeal, 25 L. J. Ch , 389. Cf. Blore v. Sutton, 3 Mer., 237.

(*x*) Westmacott v. Robins, 4 De G. F. & J., 390.

(*y*) Torrance v. Bolton, L. R. 14 Eq., 124, 135; affirmed L. R 8 Ch., 118

[1] *Interest where the purchase price has not been paid or tendered.*] The purchase price belongs to the vendor from the time fixed for the completion of the contract. He is entitled to interest upon it, provided it is not then paid or tendered. Hart v. Brand, 1 A. K. Marsh., 161; Breckenridge v. Hoke, 4 Bibb, 273; Drake v. Barton, 18 Minn., 462; see, also, Warrall v. Munn, 38 N. Y., 137; Gillet v. Maynard, 5 John , 85; Jones v. Jones, 49 Tex., 683.

Rents and profits.] The property sold belongs to the vendee from the time fixed for the completion of the contract, and he is entitled to the rents and profits from that time. The vendee died, leaving minor heirs, after he had paid a portion of the purchase money and taken possession of the estate. After his death the vendor re-entered, wasted the property, and sold it. In an action for specific performance, held, that the vendor should pay the highest rental value of the land since his re-entry. Cole v. Tyson, 8 Ired.'s Eq., 170. "Whatever may be the rule where a trustee has not himself occupied and enjoyed the trust estate, but has received rents from it, justice and equity demand that where he has wrongfully excluded the true owner, and has himself occupied and enjoyed the fruits of the estate, he shall at least account for its rental value." *Per curiam*, Henlen v. Martin, 53 Cal , 321. In one case the interest had accumulated until it amounted to considerably more than the rents and profits, and it was held that the vendor should be left in the enjoyment of them until a good title was shown, and that then he should receive interest on the purchase money, and the vendee reasonable rents and profits, notwithstanding, by reason of a fire which destroyed the building, no rents were received. Lombard v. Chicago Sinai Con., 75 Ill., 271. The owner of an undivided half of an estate, contracted to convey the whole Held, that if the vendee elects to take what the vendor can convey, he need pay or tender only one-half the contract price, and the vendor is not entitled to any portion of the rents and profits accruing subsequent to the making of the contract. Marshall v. Caldwell, 41 Cal., 611.

PART VI.

OF SOME CONTRACTS IN PARTICULAR.

CHAPTER I.

OF CONTRACTS FOR THE SALE OF SHARES.

§ **1468**. The subject-matter of this chapter is contracts for the sale of shares between an existing and an intending shareholder, not contracts for the taking of shares from a company by an applicant. Contracts of the latter kind have been referred to in a previous part of this treatise.(*a*)

§ **1469**. The vendor or purchaser of shares may generally, as we have already seen,(*b*) maintain an action for the specific performance of the contract:(*c*) he will be entitled to a direction that the defendant execute a proper deed of transfer and concur in all steps necessary to procure its registration, and also, in the case of the vendor being plaintiff, to a declaration of his right to indemnity in respect of calls on the shares accruing after the purchaser has become the owner in equity:(*d*) and where the circumstances of the case do not demand the whole of this relief, the plaintiff may receive so much as suits the necessities of the case: so, for example, the decree or judgment has, in some cases been merely one for indemnity.

§ **1470**. The courts of common law having recognized the liability of the purchaser to indemnify the vendor, actions were, before the judicature acts came into operation, maintained on this liability in those courts.(*e*)

§ **1471**. Contracts of this description are, for the most part, made on the stock exchange, and it has been long established that, in such cases, the contract must be held to

(*a*) Supra, §§ 55, 283, 285.

(*b*) Supra, § 54.

(*c*) As to proceedings under the Companies Act, 1862, s. 35, see supra, §§ 1111, 1112.

(*d*) As to the form of the judgment in such a case, see Evans v. Wood, L. R. 5 Eq., 9; Paine v. Hutchinson, L. R. 3 Ch., 388. See, also, Sheppard v. Murphy, I. R. 1 Eq., 490; 2 Eq., 544; 16 W. R., 948; approved in Cam. Scac., Grissell v. Bristowe, L. R. 4 C. P., 36, 151.

(*e*) Walker v. Bartlett, 18 C. B., 845, which must be taken to overrule Humble v. Langston (7 M. & W., 517) on the point of indemnity. See, too, Kellock v. Enthoven, L. R., 8 Q. B., 458; affirmed, 9 id., 241.

be made with reference to the customs of that body, or such of them as are not unreasonable or otherwise illegal ;(*f*) the customs being partly written and partly unwritten, and liable to change from time to time, and to be proved afresh, and possibly differently, in each succeeding case.

But contracts for the sale of shares are sometimes made off the Stock Exchange, and then they are not regulated by any special customs, though they are naturally construed with reference to the constitution of the company, as established by its special act, charter of incorporation, or other constituent instrument.

§ **1472**. In order to comprehend the nature of contracts on the Stock Exchange, it must be observed that the members of the Stock Exchange consist of two classes, brokers and jobbers : that a broker is an agent of a vendor or purchaser of shares or stock ; that a jobber is a dealer on his own account in the like commodities, who buys them for the purposes of re-sale at a profit : that on the Stock Exchange there are two classes of contract, those for cash and immediate execution, and those for the "account :" and that, as regards the dealings for the account, there are three successive days or times which, according to the customs of the Exchange, govern the execution of such contracts, viz.: first, the name day, when a purchasing broker or jobber has to give the name of the original or of a substituted purchaser to the vendor's broker ; secondly, the account or settling-day, which is the day after the name day—on this day the price has to be paid to the vendor's broker ; and thirdly, a period of ten days after the account day, allowed for the completion by registration of the transfers of the shares, where registration is required.

§ **1473**. Bearing these facts in mind, the reader will be able to follow the practice on the Stock Exchange, which was fully stated in the evidence of Mr. De Zoete read by Lord Cairns in addressing the House of Lords in the case of Nickalls v. Merry :(*g*) "In the case supposed, where the jobber would stand as purchaser, he would on the day preceding such account day (which was usually called the 'name day') be bound to pass to the broker a ticket containing the

(*f*) Nickalls v. Merry, L. R. 7 H. L., 530.

(*g*) L. R. 7 H. L., 539-541. See, too, ex parte Grant, 13 Ch. D., 667.

name of a person, or of several persons, as the purchaser or purchasers of the said shares; or he might, if he pleased, pass his own name as such purchaser, in which latter case only would he have been bound himself to take to the shares. If the jobber had failed to pass to the broker such a name or names by the name day, the selling broker could have sold out the shares against him, and have compelled him to pay any loss thereon. Until the name day it was not seen who might stand ultimately either as purchasers or sellers, or, in other words, who might be the persons to transfer or to take transfers of shares, and until then a jobber might have had a great many transactions both of buying and selling with the same brokers or jobbers, or with various brokers or jobbers. On the name day, in the case supposed, if the jobber having purchased had sold again, a ticket, containing the name of the person to whom the shares were to be transferred, would have been issued by and passed on from the ultimate purchasing broker to his seller, and so on through the hands of the other intermediate sellers and buyers in succession, who, whether acting as jobbers or as brokers, had dealt in the shares, until it reached the hands of the original selling broker. Every member passing a ticket was required to write on the back of it the name of the member to whom it was passed; such ticket would also have contained the amount of purchase-money agreed to be given for the shares by the ultimate purchasing broker, and also a note that he would pay the same. So many transactions of this kind took place during the account, that on the name day the ticket of necessity only remained in the possession of an intermediate jobber or broker for the time required to take the particulars of it. It sometimes happened that the same ticket passed through the same member's hands several times in fulfillment of bargains made with other members, and, as a matter of fact, he had neither the opportunity, time, nor the means for making inquiries respecting the name so passed. The original selling broker would not have been bound to deliver a transfer of the shares to the ultimate purchasing broker until the expiration of ten days after the account day, and during these ten days the said purchasing broker could not have bought in the shares against the seller. During this time it

was open to the original selling broker to object to the name passed by his buyer, in which case such buyer would, of course, have passed on the objection to the person from whom he received the name as hereinbefore mentioned, and practically such buyer would have had no liability or interest in the question, as whatever grounds there might have been for objecting to the name would have had to be met by the person from whom it emanated, and who had originally issued the ticket, and the committee of the said Stock Exchange would, if appealed to by the selling broker, have decided as to the validity of any such objection, and would have required another name to be given in case they had considered it right to do so. But after the lapse of these ten days the selling broker was required to deliver the certificates and transfer of the shares to the said ultimate purchasing broker, or in default thereof, the latter could have bought in the shares against the seller. The usual course of business was for the selling broker to deliver the transfer, together with the corresponding ticket, to the said ultimate purchasing broker from whom he received the purchase-money. The said ultimate purchasing broker did not know to whom his ticket had been ultimately passed until the delivery of the transfer. According to the long-recognized and well-established rules and usages of the said exchange, if the original selling broker did not deliver his transfer and certificates and obtain payment of the purchase-money within fifteen clear days from the name day, his immediate buyer was released from all loss caused by the default of the ultimate purchasing broker to pay for the shares, and the latter would alone remain responsible; in like manner, if the member who issued the ticket containing the name of the intended transferee of the shares did not buy in, or attempt to buy in, the same shares within fifteen days from the account day, his immediate seller was released from all loss caused by the failure of any member through whose default the shares were not delivered to, and the purchase-money paid by, the ultimate purchasing broker; the jobber had fulfilled all the obligations required of him by the rules and usages of the said Stock Exchange in respect of his contract."

§ **1474**. In this passage, and in several of the cases which

have occurred, the jobber is spoken of as if his rights and liabilities were distinct from those of a broker. But the broker of a purchaser, and through him as principal the purchaser, appeared to be in precisely the same position as a jobber.(*h*)

§ **1475**. Such being the practice, the contract of sale to a jobber has been determined to be to the effect that, at the sitting-day, he will either take the shares himself, in which case he must accept and register a transfer and indemnify the vendor, or he will give, as purchaser or purchasers, the name or names of one or more persons capable of contracting and who have authorised him to contract for them, and to whom no reasonable objection can be made: and that when the vendor has, by executing a transfer to the nominees, accepted them as purchasers, and the nominees have accepted the shares, through the delivery to their brokers, on a payment by their brokers, of the transfers and certificates of shares, then two things follow, viz., (1) a new contract arises between the original vendor and the nominees of the original purchaser; and (2) as a consequence, the original purchaser is released and no action can be maintained against him in respect of the contract.(*i*) So that he is not in any sense a guarantor of the performance of the new contracts by his subvendees.

§ **1476**. The peculiarity of this transaction does not consist in the extinction of the original contract by the new one: that occurs in many cases: but in the right reserved by the original contract to the purchaser to compel the vendor to accept a new contract in lieu of the old one. In short, the original contract with the purchaser is one for sale and purchase, with a right reserved to the purchaser, under certain circumstances, to call on the vendor to enter

(*h*) See Maxted v. Pain (2d action), L. R. 6 Ex., 132, 170; consider Street v. Morgan, 21 L. I. N. S., 432

(*i*) Coles v. Bristowe, L. R. 4 Ch., 3, reversing S. C. L. R 6 Eq., 149; Grissell v. Bristowe, L R. 4 C. P., 36, reversing S. C. L. R. 3 C. P., 112. In Maxted v. Paine (2d action), L. R. 6 Ex., 132, Lord (then Mr. Justice) Blackburn subjected the whole matter to a very elaborate examination, and held that it was no part of the contract of a purchaser of shares to give in either his own name or that of his real principal: that he contracts to accept a transfer into the name which he furnishes, and to indemnify the vendor against all calls after the transfer is executed and delivered to him: that the vendor has no right to object to execute a transfer to any one named by the purchaser, and does not, by executing the transfer, release the purchaser from his liability to indemnify. His Lordship held, as a consequence, that Coles v. Bristowe and Grissell v Bristowe (ubi supra) were rightly decided, but on wrong grounds, and that Maxted v. Paine [1st action] (L. R. 4 Ex., 81) was wrongly decided. See, as to this judgment, per James, L. J., in Merry v. Nickalls, L. R. 7 Ch., 750. Lord Blackburn's views seem to be practically overruled by the decision of the House of Lords in the last-named case (L. R. 7 H. L., 530).

into a new and substitutionary contract, and an obligation on the part of the vendor to do so. It is an effective contract to contract.

§ **1477**. Of the original liability of the first purchaser to be sued in specific performance and for indemnity there is no doubt. Let us now inquire a title more exactly what such original purchaser must have done to relieve himself from his original liability.

1st. He must give as purchaser the name of a person capable of contracting. Accordingly it has been decided that the passing on the name of an infant is no satisfaction of the jobber's liability.(*j*)

2d. He must give as a purchaser the name of a person who has authorised the original purchaser to bind him to a contract of purchase: so that passing on the name of a person who gave no authority is no satisfaction of the first purchaser's liability.(*k*) As regards these two points, it has been urged that if no objection was taken to the name within ten days after the settling-day, that being the period allowed for the approval or rejection of the name of the ultimate purchaser, the original vendor lost his right to object: but the contrary has been held; the personal responsibility, and not the personal capacity or authority, being the only point left for inquiry and determination within the ten days.

3d. The original purchaser must give a name to which no reasonable objection can be taken. It seems that residence in Smyrna would be a reasonable objection.(*l*) This objection, if not taken within ten days, would come too late.

§ **1478**. The nominee of the original purchaser, whether jobber or purchasing broker, is in most cases a sub-vendee. But this is not necessary. The exigency of the contract is satisfied if the name given as that of a purchaser be that of a person capable of contracting and who has contracted to take the shares. Thus, where the person named was a man

(*j*) Merry v. Nickalls, L. R. 7 Ch., 733; S. C. s. n. Nickalls v. Merry, L. R. 7 H. L., 530 (reversing the decision of Bacon, V. C., in S. C. L. R. 7 Ch., 740, and overruling Rennie v. Morris, L. R. 13 Eq., 203); Dent v. Nickalls, 22 W. R., 218; Watson v. Miller, W. N., 1876, 18 (Hall, V. C.); Heritage v. Paine, 2 Ch. D., 594. Cf. Nickalls v. Furneaux, W. N., 1869, 118 (James, V. C.), and Maynard v. Eaton, L. R. 9 Ch., 414. See, also, Brown v. Black, L. R. 15 Eq., 363; 8 Ch., 939.

(*k*) Maxted v. Paine (1st action), L. R. 4 Ex., 81.

(*l*) Allen v. Graves, L. R. 5 Q. B., 478, which case, however, was on a special contract.

of straw, who for a gratuity accepted the shares in a broken company, and the vendor's brokers did not object to the name given or require a better name, the original purchaser was held to have performed his contract, and so was no longer bound.(*m*)

Whether the original purchaser is bound to do anything more than produce a new contracting party, *i. e.*, whether he is liable till the new purchaser has actually accepted the transfer of the shares, is a point which is hereafter considered.(*n*)

§ **1479**. Where the nominee's name has been given, with his authority, by the jobber or purchasing broker, and such name has been accepted by the vendor by his executing the transfer to the nominee, and the nominee has, through his broker, paid for the shares and accepted the transfer and certificates, a new contract, as we have seen, arises between the vendor and the nominee.(*o*) This new contract may be enforced by an action for indemnity,(*p*) or by an action for specific performance and indemnity.(*q*)

§ **1480**. In accordance with some of the authorities the new contract has, in the foregoing sections, been stated as arising when the nominee has paid for his shares and accepted the transfer and certificates, or, to put it in other terms, the original purchaser is only discharged when he produces a nominee who himself pays for the shares and accepts the transfer (and does not merely contract so to do).(*r*)[1] But there are not wanting authorities which would place the constitution of the new contract at a possibly earlier stage, viz., when by the ticket the new purchaser has been signified to the original vendor, and the vendor has signified his acceptance to the new purchaser.(*s*) The point has never been precisely determined: and as the only notification that the original vendor accepts the new purchaser appears to be by delivery of the transfer on payment

(*m*) Maxted v. Paine (2d section), L. R. 4 Ex., 203, affirmed in Cam. Scac. L. R. 6 Ex., 132.

(*n*) See infra, § 1480 et seq.

(*o*) See per Cockburn, C. J., in Grissell v. Bristowe, L. R. 4 C. P., 51.

(*p*) Davis v. Haycock, L. R. 4 Ex., 373; Bowring v. Shepherd, L. R. 6 Q. B., 309.

(*q*) Sheppard v. Murphy, 16 W. R., 948; I. R. 2 Eq., 544 (reversing S. C., I. R. 1 Eq., 490), approved in Cam. Scac. in Grissell v. Bristowe, L. R. 4 C. P., 36, 51; Hawkins v. Maltby, L. R. 4 Eq., 572; 3 Ch., 188; 6 Eq., 505; 4 Ch., 200; Hodgkinson v. Kelly, 6 Eq., 496.

(*r*) See per Cockburn, C. J., in Grissell v. Bristowe, L. R. 4 C. P., 51; per James, L. J., in Merry v. Nickalls, L. R. 7 Ch., 751.

(*s*) See per Brett, J., in Bowring v. Shepherd, L. R. 6 Q. B., 328; per Kelly, C. B., in Davis v. Haycock, L. R. 4 Ex., 384.

of the price, the point does not seem to be one of much practical importance.

§ **1481**. The new contract is, as we have seen, between the original vendor and the ultimate purchaser or nominee. Between the original vendor and any of the intermediate parties there is no contract.(*t*)

§ **1482**. In one case, however, it has been held that there is a right to indemnity in equity on the ground of trust. The case alluded to is Castellan v. Hobson.(*u*) There A. through his broker sold to a jobber, B. B. sold to C. through his broker. C.'s broker gave the name of D., who was a man of straw and was held to be a trustee for C. A. executed a transfer to D. and received the money: D. did not execute the transfer, and before registration the company was wound up: C. was held liable to indemnify A., on the ground that A. was a mere legal owner of the shares and entitled to indemnity from the real equitable owner, and that C. was such owner. It may be doubted how far the case can be considered as an authority since the decisions in Coles v. Bristowe(*v*) and Maxted v. Paine (second action):(*w*) for it would appear that A.'s original contract of sale was liable to be extinguished by a new contract which he agreed to enter into with a nominee, and that by executing a transfer to D. he accepted him as purchaser, and it would seem to follow that he could look to him and to no one else for indemnity. The non-registration of the transfer, too, seems immaterial according to the more recent cases.

§ **1483**. In Viscount Torrington v. Lowe,(*x*) the court of common pleas held that no action could be maintained against the subvendee whose nominee had been accepted by the original vendor, and they expressed the further opinion that there was no equitable right against him.

§ **1484**. In some cases the ordinary form of contract is departed from, and a contract is made by the jobber or purchasing broker with registration guaranteed. This superadds an important obligation on the original purchaser, so that he has not completed his contract until he has either

(*t*) Viscount Torrington v. Lowe, L. R. 4 C. P., 26.

(*u*) L. R. 10 Eq., 47 (James, V. C.) The case of Viscount Torrington v. Lowe does not appear to have been cited to the V. C. in this case. Cf. Nickalls v. Furneaux, W. N., 1869, 118 (James, V. C.)

(*v*) L. R. 4 Ch., 3.

(*w*) L. R. 4 Ex., 203, 6 Ex., 133.

(*x*) L. R. 4 C. P. 26.

himself paid for the shares and registered the transfer, or has procured some nominee to do both these things. Therefore where the jobber procured a nominee to accept or pay for the shares, but the transfer was not registered, the jobber or original purchaser was still liable to a suit for specific performance and indemnity.(*y*)

§ **1485**. Cases may, of course, often occur where, independently of the customs of the stock exchange, a third person may so adopt the purchaser's contract as to place himself in the shoes of the purchaser, and give to the vendor a direct right against himself. The practice of passing on shares before transfer executed gives great facilities for such a result to arise.

§ **1486**. In one case W. directed his broker to buy shares in a discount company: the broker bought them from the plaintiff, and, on W.'s instructions, gave the name of G. (a director of the company) as purchaser. G. received the transfers made out in his name, retained them, and deposited them as security for the purchase-money, which was paid out of the company's funds and debited to G.'s firm. G. denied that he had assented to the shares being bought in his name: but Stewart, V. C., held that G. had assented to the new contract, and accordingly made against him a decree of specific performance.(*z*)

§ **1487**. A somewhat similar state of facts arose in an earlier suit. There A. sold to B., and B. sold to C. A. executed a transfer to C., which C. did not register. A. then sued B., and obtained a decree directing an inquiry as to A.'s title: the Master certified in effect that A., by executing the transfer to C., had precluded himself from making a title to B., and on this ground the bill was dismissed on further consideration.(*a*)

§ **1488**. So again, in the case of a contract between A. and a company to take shares and make certain payments, the registration by the company of a transfer by A. to B., before A. had made the payments entitling him to be registered as a shareholder, was held by Lord Selborne (sitting as a judge of first instance) to be a new contract

(*y*) Cruse v. Paine, L. R. 6 Eq., 641; 4 Ch., 441.

(*z*) Shepherd v. Gillespie, L. R. 5 Eq., 293.

(*a*) Shaw v. Fisher, 5 De G. M. & G. 596.

between B. and the company which extinguished the earlier contract between A. and the company.(*b*)

§ **1489**. The following circumstances require consideration in actions of this description:

The plaintiff in some cases has been only equitably entitled to the shares, which have been registered in the name of some third person. This has been held no objection to a decree for specific performance or for indemnity to the plaintiff.(*c*)

§ **1490**. Whether the fact that, before the contract was made, a call was made on the shares of which the purchaser was ignorant, was a defense to a suit for the performance of a contract to buy the shares, was a point much considered in the successive stages of the litigation in Hawkins v. Maltby,(*d*) but can hardly be said to have been there decided. In fact there the call was made on the same day as the contract, but whether before or after did not appear. In the absence of fraud or misrepresentation, it does not seem clear why the fact that a call, which the purchaser must have known could at any time be made, has been made, should avoid the contract or prevent either party from enforcing it.

§ **1491**. Where the constitution of the company gives the directors a power to refuse to register transfers, the question arises whether the refusal on the part of the directors to register the purchaser, relieves him from the obligation of performing the contract.

This question must be answered differently according to circumstances.

§ **1492**. (1) Where the contract is made on the Stock Exchange, but is made with reference to the constitution of the company, or subject to its rules, and the constitution of the company requires the vendor to do all that is essential to the transfer, the vendor is under an obligation to procure the assent of the directors, and if he fail to do so, the purchaser is relieved from the contract, and if he have already paid his purchase-money in ignorance of this refusal, he may recover it back.(*e*)

(*b*) Morton's case, L. R. 16 Eq., 104.
(*c*) Paine v. Hutchinson, L. R. 3 Eq., 257; 3 Ch., 388.
(*d*) L. R. 4 Eq, 572; 3 Ch., 188; 6 Eq., 505; 4 Ch., 200.
(*e*) Wilkinson v. Lloyd, 7 Q. B., 27; cf. per Lord Campbell, C. J., in Stray v. Russell, 1 El. & El., 900.

§ **1493**. (2) Where the contract is made on the Stock Exchange and subject to its rules, it is clear that the refusal of the directors to register the transfer is immaterial; for, according to the construction put upon such a contract, it is performed on the vendor's part by the delivery of the transfer and certificates, and the vendee is entitled to the right which he thereby acquires to procure himself to be registered, if the directors so choose: he is not entitled to an absolute and unconditional right to registration.(*f*) In a sale on the Stock Exchange it is no part of the vendor's duty, irrespective of express contract, to procure the registration of the transfer.(*g*)

§ **1494**. (3) There are numerous contracts for the sale of shares which fall under neither of the two classes just adverted to: and with regard to these it is more difficult to say what is the effect of the power of the directors to refuse registration, or of their actual refusal.

Opposite views have been expressed. On the one hand, Lord Romilly, M. R., in one case expressed the view that every contract for sale of shares is conditional on the company accepting the purchaser as a shareholder:(*h*) on the other hand, Lord Chelmsford intimated an opinion that in no ordinary case will the discretionary power in the directors furnish a defense. "The directors," he said, "may decline to register, but the transaction is complete as between transferor and transferee."(*i*)

The opinion expressed by Lord Romilly, M. R., in the case referred to,(*j*) can probably not now be sustained.

§ **1495**. In a subsequent case, before the last-named judge, the deed of settlement of the company provided that no shareholder should transfer his shares, except in such a manner as the board should approve: a shareholder contracted to sell his share: the board refused its consent to his making the transfer: and the vendor then refused to complete: the purchaser filed his bill, and obtained a decree on the ground that the deed of settlement did not prevent the sale of shares or give the directors an arbitrary

(*f*) Remfry v. Butler, El. B. & E., 887; Stray v. Russell, 1 El. & El., 888.

(*g*) Stray v. Russell, 1 El. & El., 888. As to purchases with registration guaranteed, see supra, § 1484.

(*h*) Bermingham v. Sheridan, 33 Beav., 660.

(*i*) Hawkins v. Maltby, L. R. 3 Ch., 194. See per Lord Romilly, M. R., in Hodgkinson v. Kelly, L. R. 6 Eq., 496.

(*j*) Bermingham v. Sheridan, 33 Beav., 660.

will on such an occasion: in case the parties differed the conveyance was to be settled in chambers.(*k*)

§ **1496**. Whether, independently of the rules of the Stock Exchange or of other special contract, the duty of procuring the transfer to be registered rests on the vendor or purchaser, has not been the subject of any conclusive decision. It is a point of great moment for the determination of the question now under our consideration: for, if it rests on the purchaser, his non-performance of his obligation can never prejudice the vendor. There are in the cases arising upon Stock Exchange contracts(*l*) numerous *dicta* which imply that, generally, the duty is upon the purchaser, and it is apprehended that this will be decision of the question when it shall arise.

§ **1497**. It is settled, and indeed could hardly be doubted, that when, through the fault or default of the defendant, the transfer had not been presented for registration, and then a winding up had intervened, and there was no evidence to show, if the transfer had been duly presented by the defendant, he would not have been accepted as a transferee, the objection based on the refusal to transfer must fail.(*m*)

§ **1498**. The winding up of the company has, in many of these cases, been urged as an objection to the relief sought. here we must distinguish between cases in which the presentation of a petition was before and those in which it was after the making of the contract.

§ **1499**. (1) Where the petition has first been presented, then the contract has been made by both parties in ignorance of that fact, and then the petition has resulted in a winding up, there has been common mistake or common ignorance: and in such a case it appears that the court could not compel the specific performance of the contract.(*n*)

§ **1500**. (2) But where the petition has been presented after the making of the contract, the defense does not appear admissible: for the general rule, that the destruction or failure of the subject matter of a contract after it is entered into is no defense, must prevail,(*o*) and if the contract

(*k*) Poole v. Middleton, 29 Beav., 646.
(*l*) Sheppard v. Murphy, L. R. 2 Eq., 544; 16 W. R., 948; Stray v. Russell, 1 El. & El., 888; Evans v. Wood, L. R. 5 Eq., 9; Hodgkinson v. Kelly, L. R. 6 Eq., 496.
(*m*) Evans v. Wood, L. R. 5 Eq., 9; Paine v. Hutchinson, L. R. 3 Ch., 388.
(*n*) Emerson's Case, L. R., 1 Ch., 433.
(*o*) Coles v. Bristowe, L. R. 6 Eq., 149; Taylor v. Stray, 2 C. B. N. S., 175.

cannot be performed *modo et formâ*, the court can still give relief by way of indemnity.(*p*)

§ **1501**. The point has been urged in various forms. It has been said that the substitution of the one name for the other on the register of the company is part of the contract, and that by the winding up of the company this has become impossible: and further, as regards companies under the companies act, 1866, that the effect of the 131st and 153d sections of that act is to render transfers after the commencement of the winding up absolutely illegal and mere waste paper.(*q*) But neither of these arguments seems valid. As to the first, it may be replied that, unless by special contract, the vendor is not bound to procure the registration, but that duty rests on the purchaser,(*r*) and that in cases of contracts on the Stock Exchange the registration of the transfer is no part of the bargain: as to the second point, it is clear that the effect of the statute is not to make the transfer illegal or void, but to give a discretion to the liquidator, or the court, to allow them to operate or not to operate as transfers.(*s*) In short, the question who is on the register is one between the company and the shareholder; the question who is to bear the calls and take the profits is one between the buyer and seller, with which the company is not concerned.(*t*)

(*p*) Cruse v. Paine, L. R. 6 Eq., 641, 653. Birmingham v. Sheridan, 33 Beav., 660, probably cannot be supported. Distinguish Holmes v. Symons, L. R. 13 Eq., 66.

(*q*) Chapman v. Shepherd and Whitehead v. Izod, L. R. 2 C. P., 228; Sheppard v. Murphy, I. R. 2 Eq., 544; 16 W. R., 948.

(*r*) See supra, § 1496.

(*s*) Chapman v. Shepherd and Whitehead v. Izod ubi supra; Emmerson's Case, L. R. 1 Ch., 433; Sheppard v. Murphy, ubi supra.

(*t*) See per Lord Romilly, M. R., in Hodgkinson v. Kelly, L. R. 6 Eq., 496.

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[1] The doctrines of English chancery have, in this respect, been carried out in this country. So in Lewis v. Madisons, 1 Munf., 303, a contract under seal between two brothers, by which one of them agreed to convey to the other a certain tract of land expected to be devised to him by their father, when he should have obtained possession of it, was held not to *contra bonos mores*. And it was further said that an action of covenant could be supported thereon, or that it could be specifically enforced in equity. Price v. Winston, 4 Munf., 63, is a repetition of the same principle. There a testator having devised certain slaves to his sister, during her life, and after decease to be equally divided among them, "to them and their heirs forever," a written agreement not under seal, entered into in her life-time by all her children then living, to stand to a fair and equal division of said estate among the children who should be living at her death, and the issue of such as should have then died, or might die before her, was decided not to be a *nudum pactum*, but founded on sufficient consideration, and, therefore, binding on the contracting parties.

CHAPTER II.

OF CONTRACTS RELATING TO CONTINGENT INTERESTS AND EXPECTANCIES.

§ **1502**. At common law it has been laid down that the possibility of succession is not an object of disposition, and that if the heir were to dispose of the succession during the life of the ancestor, such disposition would be void, though the inheritance should afterwards have devolved on him.(*a*)[1] However, in a case before the Queen's Bench, the court supported as valid a contract to sell an estate if it should be devised to the vendor by a person then living.(*b*)

§ **1503**. In courts of equity contracts relating to expectancies have been long upheld,(*c*) and that although they may in some sort seem to have defeated the intentions of testators, or been in fraud of parental authority.

§ **1504**. One of the earliest cases on the subject is Wiseman v. Roper,(*d*) where a covenant to settle an estate, to which the covenantor had only an expectancy as heir, was after the descent of the lands specifically enforced against him.

§ **1505**. In Beckley v. Newland,(*e*) the plaintiff and the defendant had married two sisters, who were the presumptive heiresses of Mr. Turgis, a very rich man, who had made and revoked several wills, and ultimately made one leaving a great estate to the defendant, and only a small one to the

(*a*) Per Lord Kenyon, M. R., in Jones v. Roe, 3 T. R., 93. The Roman law likewise prohibited such contracts. Pothier, Tr. des Oblig., Part 1, chap. 1, s. ct. 4, § 2.

(*b*) Cook v. Field, 15 Q. B., 460.

(*c*) Cf. Alexander v. Duke of Wellington, 2 R. & My., 35. The statement attributed to Lord Eldon in Carleton v. Leighton (3 Mer., 671), that the expectancy of an heir could not be made the subject of contract seems an error of the reporter. Apparently the word contract is written for conveyance.

(*d*) 1 Rep. in Ch., 154.

(*e*) 2 P. Wms., 182.

[1] Varick v. Edwards, 11 Paige's Ch., 290; Anderson v. Lewis, 1 Freem. Ch. (Miss.), 178; Baylor v. Commonwealth, 40 Pa. St., 37; Powers' App., 63 id., 443; Masten v. Marlow, 65 N. C., 695. In Kentucky, a contrary doctrine is held. Lomry v. Spear, 7 Bush (Ky.), 451. The husband agreed to convey land belonging to his wife, in which he had a life estate by the custody: the wife refused to convey. Held, that the contract could not be specifically enforced, and that he could not be compelled to convey his life estate in the same. McCann v. Jones, 1 Rob. (Va.), 256. An executory verbal contract depended upon an event which might never happen. Held, that equity would not decree specific performance. Bradley v. Morgan, 2 A. K. Marsh, 369.

plaintiff. Previously to the execution of the will, the plaintiff and the defendant had entered into a contract for the equal division between them of what should be left to each of them; and this contract was upheld and specifically enforced by Lord Macclesfield, who said that the contract was "not disappointing the intent of the testator, for he did not design to put it out of either of the devisees' power to dispose of the estate after it should come to him; but, on the contrary, when the testator gave it to either of them, he by implication gave that person a power to dispose of the said estate when it should come to him." The same principle was pursued by his Lordship in another like case,(*f*) and was followed by Lord Hardwicke, in upholding the validity of the conveyance of a contingency or possibly on the death of a sister unmarried.(*g*)

§ **1506**. In Harwood *v.* Tooke,(*h*) the plaintiff and the defendant, the celebrated John Horne Hooke, had made a parol contract to divide what should come to them from a testator: in satisfaction of this the plaintiff had given to the defendant Tooke a note for £4,000, which he had endorsed over to the other defendant, Sir Francis Burdett, for valuable consideration. All that Lord Eldon ultimately decided in the case may have been that the plaintiff had no equity to follow the note into the hands of this purchaser for value; and it appears from one of the reports that he expressed doubts whether the transaction between the plaintiff and the defendant Tooke was not a fraud on the testator, and whether the court would at any rate assist in specifically performing such a contract. But the case has usually been treated as an authority for the validity of contracts relating to expectancies.(*i*)

§ **1507**. In another case the contract seemed, at first sight, in fraud of the parental authority, but was upheld on a like ground to that taken by Lord Macclesfield. A contract had been entered into by two sons to divide equally between them whatever they might receive from their father in his lifetime or after his decease, by will or otherwise. It was very strongly argued that this was a scheme on the part

(*f*) Hobson v. Trevor, 2 P. Wms., 191.
(*g*) Wright v. Wright, 1 Ves. Sen., 409.
(*h*) 2 Sim., 192, from Mr. Maddock' MS. n.; 1 My. & K., 685.
(*i*) See per Shadwell, V. C., in Wethered v. Wethered, 2 Sim., 191; Hyde v. White, 5 Sim., 524; and per Lord Brougham in Lyde v. Mynn, 1 My. &. K., 693.

of the sons to protect themselves from the consequences of misconduct, and to bid defiance to parental authority. But Shadwell, V. C., held that, as the testator had the power of giving an estate to his sons, so that they should have only the personal enjoyment without power of alienation, and did not choose so to give it, but gave it absolutely, he had allowed it to become liable to all their antecedents contracts, and therefore to the contract in question, of which specific performance was accordingly granted.(*j*)

§ **1508**. Similar in principle is the case of Lyde v. Mynn,(*k*) where a husband granted an annuity for his life, and by way of further security covenanted to charge it on all the property he should, in the event of his wife's decease, become entitled to by her will or otherwise; and it was held that no objection could be taken on the ground of its relating to a mere expectancy; and the court accordingly specifically performed the covenant. And so, again, contracts respecting the costs of proceedings in lunacy, or the ultimate division of a lunatic's property are not void.(*l*)

§ **1509**. In a case recently decided by Denman, J., a husband and his wife had assigned to one of the plaintiffs (who was held by the judge to be a trustee for the other plaintiffs) all the interest to which the wife or the husband might become entitled under the will of C. (who had, at the time, to the wife's knowledge, made his will leaving his residuary estate to her for her separate use), to secure £4,000 borrowed by the husband for the payment of his debts: and C. had died without altering his will. It was held that the wife had power to charge, and had by the contract effectually charged, her expectancy.(*m*)

§ **1510**. The circumstances attending such contracts as those now under discussion, are oftentimes of such a kind as to prevent the court from enforcing them. Such were the circumstances in Morse v. Faulkner(*n*) in the exchequer, and in the more recent case of Ryan v. Daniel.(*o*) In the latter case each of the two young officers in the army signed and gave to the other a document, by which each charged his estate with £1,000 in favor of the other, in case the

(*j*) Wethered v. Wethered, 2 Sim, 183. See accordingly Hyde v. White, 5 Sim., 524; Houghton v. Lees, 1 Jur. N. S., 862; 3 W. R., 135 (Stewart, V. C.)
(*k*) 1 My. & K., 683.
(*l*) Persse v. Persse, 7 Cl. & Fin., 279.
(*m*) Flower v. Buller, 15 Ch. D., 665.
(*n*) 3 Sw., 429 n.
(*o*) 1 Y. & C. C. C., 60.

other should survive him, the consideration of each of these documents being the other of them: many years subsequently a correspondence passed between these officers with a view to a rescission of the transaction, but that intention was never carried into effect. The court held that, looking at the circumstances of the transaction, the age and condition of the parties and their subsequent correspondence, there was no equitable claim which the court would enforce, but it retained the bill for twelve months, with liberty to bring an action to establish, if the plaintiff could, a legal debt.

§ **1511**. It has been judicially suggested that contracts made by a person before the devolution of the estate or other realization of his expectancy are purely personal, and only capable of being enforced against the contractor personally during his lifetime. In Morse v. Faulkner,(*p*) in 1792, Eyre, C. B., speaking of such a case, said, "The surrendor not having any title whatever to the premises, at the time of the surrender, his agreement would not raise a lien upon the land; and although the present plaintiffs might have been relieved if they had filed their bill against him in his lifetime, that is after his title had accrued, yet it does not follow that therefore they can be relieved against his heirs. Neither the land itself or the conscience of the present defendants is bound by this act of William the surrenderor." It is however believed that this view has not received any subsequent confirmation.[1]

(*p*) 3 Sw., 429 n.; shortly reported, 1 Anster, 11.

[1] *Provision by parents for children.*] Equity will often interpose to sustain defective conveyances by parents for children. The same principle is applicable to brothers or sisters. A father, for the purpose of securing a provision for his children, executed deeds of part of his estate to them, retaining the instruments in his possession, and directing his wife to hand them to the clerk for record after his death. This was done. There was no claim by creditor or purchaser. Held, that equity would enforce the instruments. Jones v. Jones, 6 Conn., 111; Belden v. Carter, 4 Day, 66.

CHAPTER III.

OF CONTRACTS FOR PARTNERSHIP.

§ **1512**. As a general rule, the court will not enforce specific performance of a contract to form and carry on a partnership.(*a*) And notwithstanding some early authorities more or less to the contrary,(*b*) it is clear that the court would in no case compel performance of a contract to enter into a partnership not for a definite term :(*c*) for it might be dissolved as soon as entered upon, and the interference of the court would thus become simply nugatory.

§ **1513**. Where, however, the contract defines the term of the partnership, and there has been part performance of the contract, the court may specifically execute it by decreeing the parties to execute a proper deed, and, if necessary, by restraining any partner from carrying on business under the partnership style with other persons, and from publishing notices of dissolution.(*d*)[1]

§ **1514**. Whether the court would specifically enforce a contract not in terms to enter into partnership but to execute a deed of partnership to certain terms defined or ascertainable, has never, it is believed, been decided. The argument that such a judgment should be pronounced in order to give the plaintiffs legal rights, seems of much less weight now that the courts of common law and equity are united.

(*a*) Scott v Rayment, L. R 7 Eq., 112; Sichel v. Mosenthal, 30 Beav , 371; and see supra, §§ 73, 824.

(*b*) See per Lord Hardwicke in Buxton v. Lister, 3 Atk., 385; Anon., 2 Ves. Sen., 629; Anon , 1 Mad , Ch., 525 n.; Hibbert v. Hibbert, Collyer, Partn., 133.

(*c*) Hercy v Birch, 9 Ves., 357; Sheffield Gas Consumers Co. (Registered) v. Harrison, 17 Beav., 294; per Kindersley, V. C., in New Brunswick, etc., Co. v. Muggeridge, 4 Drew., 698.

(*d*) England v. Curling, 8 Beav., 129; Hibbert v. Hibbert, Collyer, Partn., 133 Cf. the pleadings in Bluck v. Capstick, 12 Ch. D., 863.

[1] This appears to be clearly the rule. Story's Eq. Jur., § 666; Collyer on Partnership (2d Am. ed.), 107, 110; Byrd v. Fox, 8 Mis , 574. It has been supposed, however, that the court would go to the length of compelling contracts of partnership; but it is probable that the court will only enforce the execution of partnership deeds. "The reason is clear; a contract of partnership is of an essentially personal character; on the lunacy of one partner, the other may apply to the court for a dissolution, and he himself cannot be kept to his part of the contract. So, in general, a partnership is dissolved by the death of either party. It would be of ill consequence in general to say, that, in articles of partnership in trade, where no provision for the death of either is made, they might subsist for benefit of an executor who may not have skill therein." Bat. Specif. Perform., p. 166.

§ **1515**. Contracts for partnership may in some cases be illegal, as amounting to sales of office, as contravening the laws regulating trade, or otherwise.(*e*) It is hardly necessary to observe that the court will not in any way interfere for the benefit of parties claiming under such contracts, or in favor of contracts for partnership tainted with fraud, hardship, or improper conduct.(*f*)

§ **1516**. Again, where the contract had reference to the manufacture and sale of a patent medicine, Lord Eldon considered that the court could not decree specific performance, because, if the receipe were a secret, the court had no means of enforcing its own orders.(*g*)

§ **1517**. There are of course a great many cases(*h*) in which courts of equity give specific relief on partnership articles: but these are not cases of specific performance of executory contracts.

(*e*) See Hughes v. Statham, 4 B. & C., 187; Knowles v. Haughton, 11 Ves., 168.

(*f*) Vivers v. Tuck, 1 Moo. P. C. (N. S.), 516; Maxwell v. Port Tenant, etc., Coal Co., 24 Beav., 495.

(*g*) Newbery v. James, 2 Mer., 446. See also, as to secret medicines, Williams v. Williams, 3 Mer., 157; Green v. Folgham, 1 S. & S., 398; Yovatt v. Winyard, 1 J. & W., 394. See also Lingen v. Simpson, 1 S. & S., 600.

(*h*) E. g. Homfray v. Fothergill, L. R. 1 Eq., 567.

CHAPTER IV.

OF CONTRACTS FOR THE SALE OF SHIPS.

§ **1518**. Contracts for the sale of ships, or of shares in ships, have long been affected by legislation. The present position of legislation is shortly this. By the merchant shipping act, 1854 (17 & 18 Vict. c. 104), it is enacted (s. 55) that a registered ship, or any share therein, when disposed of to persons qualified to be owners of British ships, shall be transferred by bill of sale, containing such description of the ship as is contained in the certificate of the surveyor, or such other description as may be sufficient to identify the ship to the satisfaction of the registrar, and which shall be in a form(*a*) given by the statute, or as near thereto as circumstances permit, and executed by the transferer before and attested by one or more witnesses: no individual is entitled to be registered as transferee till he has made a certain declaration (s. 56): and (s. 57) every bill of sale with the required declaration is to be produced to the registrar, who is to enter the name of the transferee as owner in the registrar.(*b*)

§ **1519**. By the merchant shipping act amendment act, 1862, (25 & 26 Vict., c. 63,) s. 3, it is declared to be the intention of the merchant shipping act, 1854, that, without prejudice to the provisions contained in that act for preventing notice of trusts from being entered in the register book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by that act on registered owners and mortgages, and without prejudice to the provisions contained in that act relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interests therein, in the same manner as equities may be enforced against them in respect of any other personal property.(*c*)

(*a*) Cf The Merchant Shipping Act Amendment Act, 1855 (18 & 19 Vict., c. 91), s. 11.

(*b*) The registration of a bill of sale, which is in fact invalid, gives no title to the person thereby registered. Orr. v. Dickinson, Johns., 1; cf. Holderness v. Lamport, 9 W. R., 327; 30 L. J. Ch., 489.

(*c*) See Stapleton v. Haymen, 12 W. R., 317.

§ **1520**. The definition to persons qualified to be owners of British ships is to be found in the 18th section of the merchant shipping act, 1854, which is as follows:

"No ship shall be deemed to be a British ship unless she belongs wholly to owners of the following description; that is to say,

"(1) Natural-born British subjects:

"Provided that no natural-born subject who has taken the oath of allegiance to any foreign sovereign or state shall be entitled to be such owner as aforesaid, unless he has, subsequently to taking such last-mentioned oath, taken the oath of allegiance(*d*) to Her Majesty, and is and continues to be during the whole period of his so being an owner resident in some place within Her Majesty's dominions, or, if not so resident, member of a British factory, or partner in a house actually carrying on business in the United Kingdom, or in some other place within Her Majesty's dominions:

"(2) Persons made denizens by letters of denization, or naturalized by or pursuant to any act of the imperial legislature, or by or pursuant to any act or ordinance of the proper legislative authority in any British possession:

"Provided that such persons are and continue to be during the whole period of their so being owners resident in some place within Her Majesty's dominions, or, if not so resident, members of a British factory, or partners in a house actually carrying on business in the United Kingdom, or in some other place within Her Majesty's dominions, and have taken the oath of allegiance to Her Majesty subsequently to the period of their being so made denizens or naturalized:

"(3) Bodies corporate established under, subject to the laws of, and having their principal place of business in, the United Kingdom or some British possession."

§ **1521**. The result of this legislation appears to be clear: that any person qualified to be the owner of a British ship may sue on any contract for the sale of a ship or share in a ship, and that on obtaining judgment he will be entitled to

(*d*) As to the form of the oath, see The Promissory Oaths Act, 1868 (31 & 33 Vict. c. 72), s. 14, subs. 8.

be registered: but that, pending entry of his name as owner on the register, no notice of his equity can appear on the register, or be noticed by the registrar: that the registered owner or mortgagee can make a good transfer and give good receipts to purchasers for value without notice of the equity under the contract: and lastly, as regards unqualified persons, that they cannot maintain an action for the sale of a ship or share in a ship to them.

§ **1522**. It may be convenient very briefly to advert to the history of the legislation on this topic.(*e*) The Act 26 Geo. III. c. 60 required (section 17) the bill of sale on every transfer to recite the certificate of registry, and declared that otherwise such bill of sale should be utterly null and void. The act being silent as to contracts, doubts arose which were ended by the Act 34 Geo. III. c. 68, which (section 14) made void both in law and in equity all contracts unless made in the manner prescribed by the former act. Under these acts a contract for the sale of a ship not reciting the certificate, but having a copy of the certificate annexed, was void.(*f*)

§ **1523**. These acts were repealed: and the enactment which then came into force was 4 Geo. IV. c. 41, which provided (section 29) that when and so often as the property in any ship, or any part thereof, belonging to any of His Majesty's subjects, should, after registry thereof, be sold to any other or others of His Majesty's subjects, the same should be transferred by bill of sale or other instrument in writing, containing a recital of the certificate of registry of such ship or vessel, or the principal contents thereof, otherwise such transfer should not be valid or effectual for any purpose whatever, either in law or in equity: to which was added a proviso limiting the effect of an error in such recital.

§ **1524**. This clause, which departed from the language of the older statutes, was re-enacted by the 6 Geo. IV., c. 110, s. 31, the 3 & 4 W. IV., c. 55, s. 31, and the 8 & 9 Vict., c. 89, s. 34: and the 37th section of the last mentioned act further provided that no bill of sale or other instrument in writing should be valid or effectual to pass the property in

(*e*) See Liverpool Borough Bank v. Turner, 1 J. & H. 166.

(*f*) Brewster v. Clarke, 2 Mer., 75.

any ship, or in any share thereof, or for any other purpose, until the same was entered on the register.

§ **1525**. The change of language gave rise to a question: but it was determined, under the last cited act, that executory contracts to transfer not complying with the terms of the act were avoided by them.(*g*)[1]

§ **1526**. Then came the merchant shipping act, 1854 (17 & 18 Vict., c. 104), which omitted all express reference to executory contracts, and omitted also any such words as are contained in the 37th section of the previous statute (8 & 9 Vict., c. 39): and thereupon the question arose whether executory interests might be enforced under contracts not complying with the formalities of the act: and this question was determined, as to an equitable mortgage, in the negative.(*h*) It has, however, been recently decided that an executory contract to transfer a ship to a purchaser need not be registered, and may be enforced by the registered owner notwithstanding the non-registration.(*i*)

§ **1527**. Lastly has come the amending statute of 1862 (25 & 26 Vict., c. 63), which permits the enforcement, under certain conditions, of equities, clearly including the equity which results from a contract for sale not satisfying the statutory requisites for the legal transfer.

§ **1528**. Independently of the statute of 1862, it has been determined that the merchant shipping acts do not apply to a contract relative to the produce of the sale of a ship. A. was the registered owner of certain shares for his father's representatives: he was captain of the ship, and entered into a contract with his father's administrators that he should navigate the ship for twelve months and account for the profits, and at the end of the twelve months sell the shares and account for their proceeds. He sold the ship:

(*g*) Hughes v. Morris, 2 De G. M. & G., 349; S. C. 9 Ha. 636; McCalmont v. Rankin, 2 De G. M. & G., 403, 418; Coombes v. Mansfield, 3 Drew., 193; Duncan v. Tindall, 13 C. B., 258.

(*h*) Liverpool Borough Bank v. Turner, 1 J. & H., 159; 2 De G. F. & J., 502. See, also, Chapman v. Callis, 9 C. B. N. S., 769.

(*i*) Batthyany v. Bouch, 44 L. T. N. S., 177.

[1] The requirements of the registry acts, in this respect, are the same by the laws of the United States as those of England. And it is likewise enacted here that, in every case of sale or transfer, there must be some instrument of writing, in the nature of a bill of sale, which shall recite, at length, the certificate of registry, and, without it, the vessel is incapable of being registered anew. Laws of the United States, 31st December, 1792, § 14; see Kent's Com., vol. 3, p. 143.

and on the bill filed to enforce the contract, the objection from the merchant shipping acts was overruled.(*j*) This case seems to have been thought by other judges open to doubt.(*k*)

§ **1529**. It is needless to remark that foreign ships are entirely outside the observations hitherto made. As regards contracts for the sale of such ships, or shares in them, the case of Hart v. Herwig(*l*) may usefully be consulted.

(*j*) Armstrong v. Armstrong, 21 Beav., 71, 78.

(*k*) Parr v. Applebee, 7 De G. M. & G., 585. Combes v. Mansfield, 3 Drew., 193.

(*l*) L. R. 8 Ch., 860; and see observations on this case, supra, § 106.

CHAPTER V.

OF CONTRACTS FOR SEPARATION DEEDS.

§ **1530**. It seems clear that a contract providing for the separation of husband and wife at a future time is against public policy, and will not be enforced by the court; and further that any instrument which provides for a present separation, but also prospectively looks forward to the parties living together again, and then to a future separation, is, so far as it provides for that future separation, equally unenforceable.(*a*)

§ **1531**. The jurisdiction of courts of equity to enforce the specific performance of contracts for present separation, by the execution of proper deeds of separation, was established in the House of Lords, after a learned argument against it, in the case of Wilson v. Wilson,(*b*) where Lord Cottenham showed that the law does not now consider a contract for present separation so contrary to public policy as to make void all arrangements of property arising out of it.

§ **1532**. In order to enable the court thus to interfere, there must of course be a valid contract. It is essential to this that the contract be between persons capable of contracting, and therefore, on the ground of a husband's general inability to contract with his wife without the intervention of some third person, it has been supposed that a simple contract between them to live separate will not be enforced by the court.(*c*)

§ **1533**. In more than one case, however, Lord Hatherley has expressed an opinion that a wife suing her husband for a divorce is in a position to contract with him, without the intervention of a trustee, for the abandonment of the suit in consideration of an annuity to be paid by him.(*d*)

(*a*) See per Lord Eldon in Westmeath v. Salisbury, 5 Bli. N. S., 366, 367; Earl of Westmeath v. Countess of Westmeath, Jac., 142. Cf. Woodgate v. Watson, in C. A., 16th November, 1880.

(*b*) 1 H. L. C., 538, affirming S. C. 14 Sim., 405; Fletcher v. Fletcher, 2 Cox. 99; Gibbs v. Harding, L. R. 8 Eq., 490; 5 Ch., 336; Bucknell v. Bucknell, 7 Ir. Ch. R., 130.

(*c*) Hope v. Hope, 22 Beav., 8 De G. M. & G. 731; Wilkes, 2 Dick., 791; Walrond v. Walrond, John. 18.

(*d*) Vansittart v. Vansittart, 4 K. & J., 62; Nicholl v. Jones, L. R. 3 Eq., 696; Gibbs v. Harding, L. R. 5 Ch., 336, affirming S. C. L. R., 8 Eq., 490.

And in the case of Besant v. Wood(*e*) Jessel, M. R., adopted this view, holding that a married woman must take, as incident to her undoubted right to sue (by a next friend, or even alone), for divorce or restitution of conjugal rights, the right to contract, *i. e.*, to compromise her suit; that as a necessary corollary to the right to sue, she must have the right to contract not to sue; and that therefore she can enter into a valid and enforceable contract to live separate and apart from her husband.[1]

§ **1534**. There must also be a good consideration: and as in contracts for separation this is sometimes peculiar, it will be well very briefly to allude to a few of the cases.[2]

§ **1535**. It has been decided that the staying a suit in the Ecclesiastical court for nullity of marriage, on the ground of impotency of the husband, is a sufficient consideration as against him:(*f*) and where the husband had so behaved as that the wife might have obtained a divorce *a mensâ et thoro*, and she agreed, instead of prosecuting her right, to accept maintenance from the husband, this was held a good consideration.(*g*) A good consideration is also afforded by an engagement by the trustees to indemnify the husband against the wife's debts;(*h*) or even by a covenant to that

(*e*) L. R. 12 Ch D., 622; cf. Marshall v. Marshall, 5 P. D., 19.
(*f*) Wilson v. Wilson, 1 H. L. C., 538; S. C. 14 Sim., 405.
(*g*) Hobbs v. Hull, 1 Cox, 445.
(*h*) Stephens v. Olive, 2 Bro. C. C., 90; Earl of Westmeath v. Countess of Westmeath, Jac., 126, 141; Elsworthy v. Bird, 2 S. & S., 372.

[1] There is, to say the least, considerable confusion in the cases on this point. It may, however, be laid down that courts of equity will, on no occasion whatever, enforce articles of separation by decreeing a continuance of the separation. Wilkes v. Wilkes, 2 Dick. R., 791; Worrall v. Jacob, 3 Merriv., 267; Westmeath v. Westmeath, Jac. R., 126; St. John v. St. John, 11 Ves., 529; Frampton v. Frampton, 4 Beav., 287; The People v. Mercein, 8 Paige, 45. But it seems that a contract for separation between husband and wife will be enforced by the chancellor upon proof that there was such a cause for separation as would have authorized the court to grant a divorce. McCrocklin v. McCrocklin, 2 B. Monr., 370. And equity will not, upon slight proof of conciliation, set aside articles of separation, however much disposed chancery may be to the adjustment of difficulties of this kind. Therefore, in Heyer v. Burger, 1 Hoff's. Ch., 1, where, after articles of separation, a casual intercourse, between the husband and the wife, had taken place, but upon a mere friendly footing, without cohabitation, for three or four days, and loose expressions by the wife of an intention to destroy the articles, and an expression of a wish that they had not been made, were held not to be proof of such a permanent reconciliation and agreement to live together as would warrant the court in setting aside the articles.

[2] A *feme covert* may make a valid agreement with her husband to discontinue a suit against him for separation; but she cannot make a binding contract with him for separation, except under the sanction of the court. Rogers v. Rogers, 4 Paige, 516.

effect conditional on an annuity, which was agreed to be paid, being secured ;(*i*) or, as it seems, by a covenant of a third party to pay the husband's debts.(*j*) So, in a contract which provided for the execution of a separation deed to contain all proper and usual clauses, and also a stipulation that the costs of the deed should be paid by the husband and wife's father in moieties, the court found consideration not only, it appears, in the contract as to the costs, but also in the covenant by the father to indemnify the husband, which seems to have been held to be a usual clause.(*k*)

§ **1536**. In many contracts for separation there have been contained provisions as to the care of the children which have been held to be at variance with the law, and so have formed a bar to the performance of the contract. For the law of England gives to the father the custody and control of his children, and casts on him the duty of caring for them and seeing to their education; and this duty he can neither renounce nor delegate.(*l*)

§ **1537**. On this ground the following contracts have been held incapable of performance: a contract by the father to allow an infant son to remain under the care of his mother :(*m*) a contract that the mother should have the children above seven years of age :(*n*) and a contract to allow an infant daughter to remain under the control of and to be educated and supported by her mother.(*o*) But a stipulation in a deed that her children should remain at such schools in England as the husband, or such schools elsewhere as the husband, with the consent of the wife, should from time to time direct, and that the holidays of the children should be passed by them at such places and in such manner as the trustees should from time to time direct, having regard as far as practicable to the wishes of each of them, the husband and wife, was held by Lord Hatherley, reversing the decision of Lord Romilly, M. R., to be reasonable.(*p*)

§ **1538**. An alteration in this branch of the law has recently been effected by statute (36 Vict., c. 12). The 2d

(*i*) Wellesley v. Wellesley, 10 Sim., 256.
(*j*) Wilson v. Wilson, 1 H. L. C., 538.
(*k*) Gibbs v. Harding, L. R. 8 Eq., 490; 5 Ch., 336
(*l*) Lord St. John v. Lady St. John, 11 Ves., 525; Lord Westmeath's case, Jac., 251 n.
(*m*) Hope v. Hope, 8 De G. M. & G., 731.
(*n*) Vansittart v. Vansittart, 4 K. & J., 62.
(*o*) Walrond v. Walrond, John., 18
(*p*) Hamilton v. Hector, L. R. 13 Eq., 511. 6 Ch., 701.

section of this act enacts that no agreement contained in any separation deed made between the father and mother of an infant or infants shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother; provided always that no court shall enforce any such agreement if the court shall be of the opinion that it will not be for the benefit of the infant or infants to give effect thereto.

§ **1539**. It will be observed that this enactment applies in terms only to agreements contained in deeds, and not to contracts to execute separation deeds. But as the invalidity of the deed itself is removed, the whole objection to the specific performance of the contract falls also.

§ **1540**. The questions which arise on specific relief with respect to the stipulations contained in deeds of separation do not, of course, fall within the purview of this treatise, which relates to executory contracts only.

CHAPTER VI.

OF CONTRACTS TO COMPROMISE.

§ **1541**. The court will specifically enforce private compromises of rights in the way in which it will any other contracts; and, inasmuch as the compromise of a *bonâ fide* claim to which a person believes himself to be liable, and of the nature of which he is aware, is a good consideration for a contract, the court, in enforcing the compromise, will not inquire into the validity of the claim on which it is founded.(*a*)

§ **1542**. Where the compromise sought to be enacted related to proceedings in another court, it was manifest that the Court of Chancery could only entertain jurisdiction on a bill filed.(*b*) But where the primary litigation was also in the Court of Chancery, the question arose whether the compromise could be enforced in the original suit, by an interlocutory proceeding in it, or only by a fresh suit, based on the compromise.

§ **1543**. It seems that where the immediate interference of the court was necessary to give effect to the contract, as where a party to the contract was, but for it, liable to an immediate attachment, there the court would to that extent interfere to execute the contract in the original suit.[1]

§ **1544**. Further, there is authority to show that, where all the parties to the compromise were parties to the original suit, and the equity arising out of the compromise was of

(*a*) Attwood v. Anon., 1 Russ., 353.

(*b*) See, for example, Nicholl v. Jones, L. R. 3 Eq., 696.

[1] The compromise, to be upheld by a court of equity, must relate to a doubtful claim; where the claim is undisputed, payment of a part will not discharge the rest for want of consideration. Blanchard v. Noyes, 3 N. H., 518; Seymour v. Mintern, 17 John., 169; Wheeler v. Wheeler, 11 Vt., 60; Geiser v. Kershner, 4 Gill. & Johns., 305; State v. Payson, 37 Me., 361. As to family disputes and settlements, see Gordon v. Gordon, 3 Swanst., 400; Stapleton v. Stapleton, 2 Whart. & Tucker's Eq. Cas., note; Bailey v. Wilson, 1 Dev. & Batt., 182; Price v. Winston, 4 Munf., 63; Watkins v. Watkins, 24 Ga., 412; Fulton v. Smith, 27 id., 413; Smith v. Smith, 36 id., 184; Puller v. Ready, 2 Ark., 587; Mercier v. Mercier, 50 Ga., 546. The agreement to settle a family dispute must be final to be enforced; it must also be complete in itself. Johnson v. Johnson, 40 Md., 189; Wister's App., 80 Pa. St., 484.

the same nature as the original equity, as where an account was to be taken alike under the original suit and under the compromise—where the whole matter was before the court, and the acts to be done were simple—there the court might enforce the compromise by interlocutory proceeding in the original suit.(*c*)

§ **1545**. But, before the judicature acts, if not in all other cases, at least in all cases where the contract to compromise went beyond the ordinary range of the court in the existing suit, or the equity sought to be enforced was different from that on the record, or the contract was disputed, or the right to have it enforced in the suit was disputed, or the parties were not identical, there the proper course of proceeding was by bill for the specific performance of the contract to compromise.(*d*)[1]

§ **1546**. In the litigation which arose out of the will of Mr. Samuel Swinfen, the mode of enforcing a compromise entered into by counsel was much discussed, as well as the authority of counsel to bind his client to a compromise. The original proceeding was a suit in chancery by the heir of one of the next of kin, for the purpose of securing the testator's real and personal estates whilst proceedings were being taken to set aside the will on the ground of the want of testamentary capacity. The will gave the property to Mrs. Swinfen, the widow of the testator's son. Lord Romilly, M. R., directed an issue *devisavit vel non*, in which Mrs. Swinfen was plaintiff and the heir was defendant During the trial at Stafford the leading counsel for the plaintiff and for the defendant signed a memorandum of

(*c*) Dawson v Newsome, 2 Giff., 272. The Court of Chancery would not enforce a contract for compromise between an infant and an adult, there being no mutuality : per Lord Langdale, M R , in Hargrave v. Hargrave, 12 Beav., 411.

(*d*) Forsyth v. Manton, 5 Mad , 78; Wood v. Rowe, 2 Bli., 595, 617; Askew v. Millington, 9 Ha., 65; Richardson v. Eyton, 2 De G. M. & G., 79; Pryer v. Gribble, L. R. 10 Ch., 534; which seem to overrule the dictum of Lord Eldon in Rowe v. Wood, 1 J. & W., 337, and the case of Tebbutt v. Potter, 4 Ha., 164. See, also, King v. Pinsoneault, L. R. 6 P. C , 245.

[1] The compromise of doubtful and conflicting rights and claims is a good and sufficient consideration to uphold an agreement, and highly favored at law. Zane v. Zane, 6 Munf., 406; Taylor v. Patrick, 1 Bibb, 168; Fisher v. May, 2 id., 448; Mills v. Lee, 6 Monr., 97; Hoge v. Hoge, 1 Watts; Covode v. M'Kelvey, Addis., 56; O'Keyson v. Barclay, 2 Penn., 531; McIntire v. Johnson, 4 Bibb, 48; Chamberlain v. M'Clurg, 8 Watts & Serg., 31; Moore v. Fitzwater, 2 Rand., 442; Bailey v. Wilson, 1 Dev. & Bat.'s Ch., 182. And, therefore, an agreement between a creditor and a third person, founded on a valuable consideration, to compromise the claim of the former against his debtor, will be specifically enforced by a court of equity.

compromise, including a stipulation for a conveyance of the land by the plaintiff at law to the defendant and the payment by the defendant to the plaintiff of an annuity. The memorandum of compromise was embodied in an order at Nisi Prius, and afterwards made a rule of the court of common pleas. Mrs. Swinfen declined to perform the contract, as made without her authority and against her wishes. Thereupon a rule *nisi* for an attachment against her was obtained, but discharged on the ground of want of evidence of demand of performance and refusal.(*e*) A second application for an attachment was refused because one of the judges of the court of common pleas doubted the authority of counsel to bind the plaintiff at law.(*f*) Thereupon the defendant at law and original plaintiff in equity filed a supplemental bill for the specific performance of the contract, or in the alternative that another issue *devisavit vel non* might be directed. This bill was dismissed by Lord Romilly, M. R., without costs, on the ground of want of authority of counsel:(*g*) and this decision was affirmed by Knight Bruce and Turner, L. J. J.,(*h*) on the ground that, even if the plaintiff at law was bound at law, the contract was not one of which, under the circumstances, specific performance should be decreed. Mrs. Swinfen subsequently brought an action against her leading counsel (then Lord Chelmsford) for damages, but failed.(*i*)

§ 1547. The judicature act, 1873, has introduced a great improvement in this practice. By section 24, sub-section 7, the court has in every cause power to grant all such remedies whatsoever as any of the parties may appear to be entitled to in respect of any claim properly brought forward by them in such cause; so that as far as possible all matters so in controversy between the parties may be completely and finally determined. Accordingly it has been decided that the court has jurisdiction to stay all further proceedings in the action compromised, in cases in which an independent suit would probably have previously been necessary.(*j*)

(*e*) Swinfen v. Swinfen, 18 C. B., 485.
(*f*) S. C. 1 C. B. N. S., 364
(*g*) Swinfen v. Swinfen, 24 Beav., 549.
(*h*) S. C. 2 De G. & J., 381. Cf. Holt v. Jesse, 3 Ch. D., 177; Davis v. Davis, 13 Ch. D., 861.
(*i*) Swinfen v. Lord Chelmsford, 5 H. & N., 890.
(*j*) Compare Eden v. Naish, 7 Ch. D., 781, and Scully v. Lord Dundonald, 8 Ch. D., 658, with Pryer v. Gribble, L. R. 10 Ch., 540. Distinguish Gilbert v. Endean, 9 Ch. D., 259, and cf. Davis v. Davis, 13 Ch. D., 861.

CHAPTER VII.

OF AWARDS.

§ **1548**. The Court of Chancery, in many cases, decreed the specific performance of awards, though not made rules or orders of the court, for the performance of some specific thing, as to convey an estate, assign securities, or the like;(*a*) but not, it would seem, awards simply to pay money.(*b*) The court thus decreed their performance "because," to use Lord Eldon's language, "the award supposes an agreement between the parties, and contains no more than the terms of that agreement ascertained by a third person."(*c*)[1]

§ **1549**. Lord Hardwicke(*d*) seems to have laid it down that a bill to carry an award into execution, where there

(*a*) Norton v. Mascall, 2 Verne., 24; Hall v. Hardy, 3 P. Wms., 187; Walters v. Morgan, 2 Cox, 369.
(*b*) Note of reporter, 3 P. Wms., 190.
(*c*) In Wood v. Griffith, 1 Sw., 54; see also per Turner, L. J., in Nickels v. Hancock, 7 De G. M. & G., 300.
(*d*) Thompson v. Noel, 1 Atk., 60, and see other cases cited in Russell on Awards (5th ed.), 548 et seq.

[1] Courts of equity will generally decree the specific performance of awards. McNeil v. Magee, 5 Mason, 244; Jones v. Boston Mill Corporation, 4 Pick., 507; Cool v. Vick, 2 How, (Miss.), 882; Kirksey v. Fike, 27 Ala., 383. And the ground on which the court interferes to decree specific performance of an award, is, that the award is an agreement between the parties to the submission, and that most, if not all, of the principles regulating specific performance are applicable. If, therefore, the arbitrator exceeds his authority, or does not decide all the matters submitted to him, or decide something which cannot be carried out consistently with the intention of the parties as shown by the terms of the submission, specific performance of the award cannot be decreed, as the award, to that extent, does not embody an agreement between the parties. It seems, also, that the court cannot, in such a case, separate that part of the award which cannot be enforced, and decree specific performance of the rest. Nickels v. Hancock, 35 Eng Law and Eq., 363; McNeil v. Magee, 5 Mason, 244; Kirksey v. Fike, 27 Ala., 383. In reference to the specific performance of awards to simply pay money, the general rule of this country seems to coincide with that of England. Turpin v. Banton, Hardin, 312; Story v. Norwich and Worcester R. R. Co., 2 Conn., 94; Babier v. Babier, 24 Maine, 42. But in Wood, 2 P. & H. (Va), 442, it is said that a court of equity has jurisdiction to enforce specific execution of an award concerning real estate, or of an agreement for the purchase and sale of real estate, notwithstanding that it involves the enforcement of an award to pay money. It is clearly not the rule to suffer the ends of justice to be defeated, and the jurisdiction of equity to be ousted, in cases of hardship, because of an obligation in an award to pay money. And probably the rule is the same, whether the hardship arise because of loss of remedy at law, or the inate unconscionableness of the award itself. Story v. Norwich and Worcester R. R. Co., 24 Conn., 94; Viele v. Troy and Boston R. R. Co., 21 Barb., 381..

was no acquiescence in it by the parties to the submission, or contract by them afterwards to have it executed, would not lie. But, as we have seen, subsequent cases established that the jurisdiction was not subject to these restrictions.

§ **1550**. The fact that the submission had been made a rule of the common law court created no impediment to its specific performance by the Court of Chancery,(*e*) though it would have been otherwise in a suit to set it aside.(*f*)

§ **1551**. There is an old case in which the Court of Chancery specifically enforced an award not binding by form of law.(*g*) But, in Blundell v. Brettargh,(*h*) Lord Eldon said he had met with no authority for the specific performance of an award by arbitrators appointed for the valuation of interests, where their acts, for the purpose of carrying into effect the contract for an award, were not valid at law, as to the time, manner or other circumstances, unless in the cases of acquiescence or part performance: and accordingly in the case before him he refused specific performance of a contract to sell at a valuation, which, on the construction of the contract, the court held was to be made during the lives of the parties, one of them having died before the award was made.[1]

§ **1552**. It is, however, plain that by mutual abandonment of some provision of the submission, as *e. g.*, that limiting the time for the award, the defendant may be precluded from raising in a court of equity an objection which might otherwise prevail.(*i*)

§ **1553**. The objection arising from unreasonableness, not of the submission but of the award itself, the court is not willing to entertain; for the arbitrators being judges of the parties' own choosing, it has been held that the award cannot be objected to by either of the parties, on the ground of its being unreasonable.(*j*) This principle was stated and

(*e*) Wood v. Griffith, 1 Sw., 43; Hawksworth v. Bramhall, 5 My. & Cr., 281; Blackett v. Bates, 2 H. & M., 270, 610; reversed, on point, L. R. 1 Ch., 117.
(*f*) Auriol v. Smith, T. & R., 121.
(*g*) Norton v. Mascall, 2 Vern., 24.
(*h*) 17 Ves., 232, 241. This case was not strictly one of arbitration and award, but rather of contract to sell at a valuation. See Kinneen v. Persse, 7 Ir. Ch. R., 438.
(*i*) Hawksworth v. Brammall, 5 My. & Cr., 281.
(*j*) Per Lord Hardwicke in Ives v. Metcalfe, 1 Atk., 64.

[1] Although an award, to be specifically enforced, must be binding by form of law, yet, if legally void by an apparent non-compliance with the terms of submission, caused by a mere clerical error, it will be enforced in equity, unless its performance would work injustice. Buys v. Eberhardt, 3 Mich. (Gibbs), 524.

acted on by Lord Eldon in Wood v. Griffith,(*k*) where his lordship enforced the specific performance of an award which ordered the sale of an estate under circumstances which greatly depreciated its value.

§ **1554**. Where, on the other hand, the award is more than unreasonable,—where the award is in excess of the authority given to the arbitrator, the court, of course, refuses to enforce it. In a case that came before Knight Bruce and Turner, L. JJ., the award was objected to as unreasonable, but it was contended on the other side that the court could not entertain the objection. Turner, L. J., after expressing his dissent from the observations of Lord Eldon in Wood v. Griffith,(*l*) said, "If it be a fair subject of discussion and consideration, whether one course or another course be the right one to be taken by parties who have submitted their differences to arbitration, and have said that they will abide by the decision of the arbitrator, I might agree that the judgment of the arbitrator upon that question must decide the point. But here the judgment of the arbitrator goes to the length of destroying the right of one of the parties to the agreement, though the parties never authorized Mr. Carpmael to decide that any one of them had no right, and should acquire no interest in the subject in dispute, but only agreed that he should determine the mode in which their rights and interests should be regulated. It seems to me, therefore, that, if it was necessary to decide this question upon the point of unreasonableness, that point alone would be sufficient to decide it."(*m*)

§ **1555**. The interference of the court in these cases being in exercise not of any jurisdiction peculiar to awards, but of its ordinary jurisdiction as applied to the specific performance of contracts, it follows that many, if not all, the principles applicable to ordinary actions of that nature must apply.(*n*)

§ **1556**. Where, therefore, the contract contained in the submission is such in its character as, whether from the unreasonableness, unfairness or imprudence, the court would not specifically enforce, this will prevent its interference in respect of the award founded on it.(*o*)

(*k*) 1 Sw., 43. See supra, § 400.
(*l*) 1 Sw., 43.
(*m*) Nickels v. Hancock, 7 De G. M. & G., 326.
(*n*) Nickels v. Hancock, 7 De G. M. & G., 300.
(*o*) S. C. See supra, § 400.

§ **1557**. Nor can the court interfere where the award is excessive or defective: not if it be excessive, for so far the arbitrator has gone beyond his authority, and there is no binding contract between the parties: not if it be defective, because the parties had contracted to be bound by his decision on the whole, and not on part of the matters submitted to him.(*p*)

§ **1558**. In a case where the submission was of all matters in difference, and the defendant omitted to submit questions which he alleged ought to have been decided, he was naturally held to be precluded from so doing by the course which he himself had pursued.(*q*)

§ **1559**. Where the award is uncertain on its face, and that uncertainty is not removed by the arbitrator's evidence, the court refuses specific performance of the contract, though the plaintiff may waive all claims beyond the award as construed against him.(*r*)

§ **1560**. Where the plaintiff has first sought to set the award aside, it is doubtful whether he can afterwards turn round and maintain an action for the specific performance of it, especially where there has been a considerable lapse of time.(*s*)

§ **1561**. The cases which have arisen of misconduct or impropriety of conduct on the part of persons appointed to value a rent, or the amount of purchase-money, throw light on the way in which the court would regard like misconduct on the part of persons more accurately described as arbitrators.(*t*)

(*p*) Nickels v. Hancock, 7 De G. M. & G., 300; Wakefield v. Llanelly Railway and Dock Co., 3 De G. J. & S., 11.

(*q*) Hawksworth v. Brammall, 5 My. & Cr., 281.

(*r*) Wakefield v. Llanelly Railway and Dock Co., De G. J. & S., 11.

(*s*) Blackett v. Bates, L. R. 1 Ch., 117, reversing S. C. 2 H. & M., 270, 610.

(*t*) See Emery v. Wase, 8 Ves., 505; Chichester v. McIntyre, 4 Bli. N. S., 78; Parken v. Whitby, T. & R., 366; Ormes v. Beadel, 2 Giff., 166, 2 De G. F. & J., 333.

CHAPTER VIII.

OF CONTRACTS TO REFER TO ARBITRATION.

§ **1562**. With regard to contracts to refer to arbitration, it is clear that the court will not entertain actions for their specific performance,[1] a principle in the first place, it seems, acted upon by Lord Thurlow in a case of Price v. Williams,(*a*) and which has been since well established.(*b*) In one case Knight Bruce, and Turner, L. J. J., upon this amongst other grounds, refused to compel the specific execution of a bond to refer to arbitration.(*c*)

§ **1563**. In like manner we have seen that, where there is a contract to buy at a price to be fixed by persons to be named, the court can neither compel a defendant to name a valuer, nor compel a valuer to value, nor compel the defendant to sell at any other value.(*d*)

§ **1564**. There is, however, a case before Leach, V. C., somewhat briefly reported as to its circumstances, in which, the vendor refusing to permit the referees to come upon the land, the court compelled him to permit the valuation.(*e*)[2]

(*a*) Referred to in 6 Ves., 818.
(*b*) Street v. Rigby, 6 Ves., 815; per Grant, M. R., in Gourlay v. Duke of Somerset, 19 Ves., 429; Agar v. Macklew, 2 S. & S., 418; Gervais v. Edwards, 2 Dr. & War., 80. See too Russell on awards (5th ed.), 63 et seq.
(*c*) South Wales Railway Co. v. Wythes, 5 De G. M. & G., 880.
(*d*) Wilks v. Davis, 3 Mer., 507; Darbey v. Whitaker, 4 Drew., 134; Vickers v. Vickers, L. R. 4 Eq., 529; supra, § 338 et seq.
(*e*) Morse v. Merest, 6 Mad., 26. See too supra, § 1125.

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[1] It is well established that these agreements will not be enforced. And it has been said that courts of equity never decree the specific performance of any agreement, when the decree would be a vain and imperfect one; liable at any moment to be defeated by the act of the parties themselves. Tobey v. The County of Bristol, 3 Story, 800; see, also, Connor v. Drake, 1 Ohio St. R., 166.

[2] Connor v. Drake, 1 Ohio St., 166; Tobey v. County of Bristol, 3 Story, 800; Noyes v. Marsh, 123 Mass., 286. The court will determine what is a fair value. Dunnell v. Ketletas, 16 Abb. Pr., 205. The lease made it optional with the lessor to pay for improvements to be valued by arbitrators, or to renew the lease; he refused to do either. Held, that although specific performance could not be decreed, yet as the court had acquired jurisdiction it would award compensation for the value of the improvements. Hopkins v. Gilman, 22 Wis., 476.

The award of arbitrators will be enforced.] Specific performance of an award of arbitrators will be enforced; *e. g.*, that land be conveyed, a boundary line adopted, securities assigned, or a lease be renewed at a fixed rent; this is true, although the award has not been made the order of the court, and although the agreement for arbitration names a penalty, which the losing party offers to pay. Whitney v. Stone, 23 Cal., 275. An award supposes an agreement

§ **1565**. Though the court will thus refuse specifically to enforce references to arbitration, an inequitable refusal of a plaintiff to make such a reference may disentitle him to the aid of the court, on the principle that he who seeks equity must do equity. Thus, where a deed was executed which created a lien for the amount of a solicitor's bills and advances, the amount of which was to be settled by arbitration, and the arbitrator died before the award was made; in a suit seeking the reconveyance of the property, Alderson, B., held that the contract between the parties was composed of two distinct parts—the first admitting that some balance was due to the solicitor, and the second, a contract for a specific mode of ascertaining that balance; that the latter part alone had failed; that the former part remained entire, and that the court would not decree a reconveyance without the plaintiff's consenting to do equity by having the accounts taken by the master.(*f*)

§ **1566**. Moreover, under the common law procedure act, 1854 (17 & 18 Vict., c. 125, s. 11), where any parties to any instrument in writing thereafter made or executed agree to refer any past or future differences to arbitration, and any party so agreeing, or any person claiming under such party, nevertheless commences any action against the other party or parties, or any of them, or against any person claiming under him or them in respect of any of the matters so to be referred, the court or a judge, on applica-

(*f*) Cheslyn v. Dalby, 2 Y. & C. Ex., 170.

between the parties, and contains no more than the terms of that agreement ascertained by a third person. Penniman v. Rodman, 13 Metc., 382; Thompson v. Deans, 6 Jones' Eq., 22. Where the award is valid, both parties are concluded by it, and the validity of the partition cannot be drawn in question. Emans v. Emans, 14 N. J. Eq., 114. Specific performance of an award will be decreed where the petitioner cannot obtain, by a verdict, all that it was the object of the award to give him. Kirksey v. Fike, 27 Ala., 382; Jones v. Blalock, 31 Ala., 180. But an award will not be supported, merely for the payment of money, which can be recovered at law, or by the ordinary proceedings upon the award. Turpin v. Banton, Hardin (Ky.), 312; Howe v. Nickerson, 14 Allen, 400; Babier v. Babier, 24 Me., 42; *contra*, see Wood v. Shepherd, 2 Patton & Heath (Va.), 442.

Discretion as to awards.] The court will exercise a sound discretion in the enforcement of awards, and equity will not interfere when objections to the enforcing of an award appear upon its face, or otherwise. Backus' Appeal, 58 Pa. St., 186.

Lien of an award.] Where the amount fixed by an award is to be a lien upon property, the lien attaches upon the making of the award and furnishes an element of equity jurisdiction. Memphis and Charl. R. R. Co. v. Seruggs, 50 Miss., 284; see Overbee v. Thrasher, 47 Ga., 10.

tion by the defendant or defendants, or any of them, after appearance and before pleading, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to the agreement, and that the defendant was, at the time of bringing the action, and still is, ready and willing to join in all necessary and proper acts for causing such matters to be decided by arbitration, may stay all proceedings in the action on such terms as to the court or judge may seem fit. Under this enactment orders have been made which have indirectly the effect of compelling the plaintiff specifically to perform the contract to refer to arbitration.(*q*).

(*q*) For cases under this section in the Court of Chancery and in the Chancery Division, see Willesford v. Watson, L R. 14 Eq., 572; 8 Ch., 473; Plews v. Baker, L. R 16 Eq., 564; Gillett v. Thornton, L. R., 19 id., 599; Newton v. Taylor, id., 14; Law v. Garrett, 8 Ch. D., 26.

CHAPTER IX.

OF CONTRACTS NOT TO APPLY TO PARLIAMENT.

§ **1567**. The court has not infrequently been asked to enforce the specific performance of a contract not to apply to Parliament, by means of an injunction restraining such application.

§ **1568**. It is perfectly clear that a Court of Equity has power, upon a proper case being made out, to enjoin a person from petitioning Parliament; for the court merely acts *in personam*, and does not therefore in any way interfere with the proceedings of Parliament;(*a*) but what is a proper case for this interference of the court is a question of considerable difficulty. It has even been said that it is difficult to conceive or define what are the cases in which it would be proper for the court to exercise its undoubted power of restraining any person from making an improper application to Parliament.(*b*)

§ **1569**. The mere fact that the intended application to Parliament will abrogate existing rights and create new ones, can give no right to such an injunction; for that would be to restrain parliamentary interference in all such cases.(*c*) Nor will the court interfere, even where for the protection of private interests a contract not to apply to Parliament has been entered into, provided the party making the application to the legislature may urge it upon grounds of public policy, of which Parliament can judge, but a court of equity cannot.(*d*) This seems to apply to all cases in which the application is in soliciting a bill; for in all such cases grounds of a public nature may be urged.

§ **1570**. Accordingly, in a case where the defendant company contracted with the plaintiff company not to make

(*a*) Ware v. Grand Junction Waterworks Co., 2 R. & My., 470, 483; Heathcote v. North Staffordshire Railway Co., 2 Mac. & G., 100; Lancaster and Carlisle Railway Co v. North-Western Railway Co, 2 K. & J., 293. See also, Att'y-Gen. v. Manchester and Leeds Railway Co., 1 Rail. C., 436.

(*b*) Re London, Chatham and Dover Railway Arrangement Act, L. R. 5 Ch,. 671, 679. See, too, Steele v. North Metropolitan Railway Co., L. R. 2 Ch., 237.

(*c*) Heathcote v. North Staffordshire Railway Co., 2 Mac. & G., 100.

(*d*) Lancaster and Carlisle Railway Co. v. Northwestern Railway Co., 2 K. & J., 293. See, too, per Bacon, V. C., in Telford v. Metropolitan Board of Works, L. R. 13 Eq., 594.

any line connecting their respective railways, except one which had been already applied for by the defendants, and in consideration of this the plaintiffs agreed to support, instead of opposing (as they had previously done) the application of the defendants for the last-mentioned line, and the plaintiffs performed their part of the contract, and the defendants' application was successful, the court, nevertheless refused to restrain the defendants from applying to Parliament in contravention of their contract, considering that such an application, if successful, would be so on public grounds, of which the court could not judge, and that, if it were rejected, the breach of the contract, if a legal one, might be compensated for in damages.(*e*)

§ **1571**. The only case, therefore, in which the court would interfere appears to be when the applicant is acting on private grounds only. "It might well be conceived," said Lord Hatherley (then Wood, V. C.) in one case, "that where a tenant for life had stipulated that he would not apply for a private act, he might be restrained from so doing. * * * If a man had made an agreement to buy a house or field, and afterwards found the agreement inconvenient, and wished to apply to Parliament to set it aside, that possibly might be a case in which the court would interfere, and say that this not being a matter of public policy, the man should not make the application."(*f*)

(*e*) Lancaster and Carlisle Railway Co. v. Northwestern Railway Co., 2 K. & J., 293.

(*f*) Steele v. North Metropolitan Tramway Co., L. R. 2 Ch. 238 n.

CHAPTER X.

OF CONTRACTS TO INDEMNIFY.

§ **1572**. Agreements for indemnity, whether taking the form of a covenant or of an executory contract, appear equally to attract the jurisdiction of the court by way of specific relief.(*a*) All or most of the reported cases appear to be on executed contracts.

§ **1573**. A contract by A. to indemnify B. against a payment is not broken till the payment has been made: and when made by B., he might, before the judicature acts, have recovered the amount paid by an action at law, and have obtained in that way all that he needed.

But where the contract by A. is to indemnify B. against all claims and demands of C., there is a breach so soon as C. makes the claim,(*b*) and B. may here usefully invoke the aid of a court of equity to compel A. to satisfy his demand to the relief of B., and thus specifically to perform the contract: and accordingly, in such cases, the Court of Chancery entertained jurisdiction.

§ **1574**. In the case of Ranelaugh v. Hayes (*c*) the plaintiff assigned certain shares to the defendant, and the defendant covenanted with the plaintiff to indemnify him against (amongst other things) all demands in respect of the shares: the plaintiff was prosecuted for a demand by the crown, and accordingly prayed specific performance, which was granted. The decree extended not only to the claim then advanced but to future demands, and directed the master, *toties quoties* any breach should happen, to report it to the court. It is conceived that such a judgment could not now be pronounced as regards future and repeated acts.(*d*)

§ **1575**. In a much more recent case, company A assigned its business to company B, and company B covenanted with company A that the shareholders of company A should, out

(*a*) See per Kindersley, V. C., in London and South-Western Railway Co. v. Humphrey, 6 W. R., 784.

(*b*) Warwick v. Richardson, 10 M. & W., 284; Carr v. Roberts, 5 B. & Ad., 78; Taylor v. Young, 3 B. & Al., 521; Penny v. Foy, 8 B. & C., 11.

(*c*) 1 Vern., 189.

(*d*) See Lloyd v. Dimmack, 7 Ch. D., 398

of the funds of company B, be indemnified against all liabilities in respect of company A. Actions and suits were instituted by various persons against company A in respect of claims against which the indemnity had been given, and these were not paid by company B. Company A thereupon sued for and obtained a declaration of the liability of company B to perform their indemnity.(*e*)

(*e*) Anglo-Australian, etc., Co. v. British Provident, etc., Society, 3 Giff.. 521; 4 De G. F. & J., 341. See, also, Story Eq. Jur., § 850.

ADDITIONAL NOTE.

The peculiarly English character of the jurisdiction in specific performance, has been adverted to above (page 3, § 5). The fact that no such jurisdiction existed in the Roman law, or exists (for instance) in the law of France, appears remarkable: and the following further information with regard to the French law may not be uninteresting. The clauses of the Code Civil which bear upon the point are the following:

"1142. Toute obligation de faire ou de ne pas faire se résout en dommages et intérêts, en cas d'inexécution de la part du débiteur.

"1143. Néanmoins le créancier a le droit de demander que ce qui aurait été fait par contravention à l'engagement soit détruit; et il peut se faire autoriser à le détruire aux dépens du débiteur, sans préjudice des dommages et intérêts, s'il y a lieu.

"1144. Le créancier peut aussi, en cas d'inexécution, être autorisé à faire exécuter lui-même l'obligation aux dépens du débiteur."

Through the kindness of Professor Holland, of Oxford, I have received the following note explanatory of the subject from M. Renault, Advocate and Professor of Law at Paris:

"Le débiteur peut-il être tenu à une exécution en nature (specific performance), ou peut-il être seulement condamné à des dommages-intérêts?

"Les principes sont posés dans les articles 1142, 1143, et 1144, du Code Civil. Ces trois articles doivent être combinés, et il en résulte une doctrine qui peut être resumée de la manière suivante:

"La formule de l'art. 1142 est trop générale: ce n'est pas toute obligation de faire ou de ne pas faire que se résout nécessairement en dommages-intérêts, c'est celle dont l'exécution effective est impossible par voie de contrainte; parce que cette exécution forcée ne pourrait être obtenue sans porter atteinte à la liberté individuelle du débiteur, sans exercer une pression matérielle sur sa personne. Ainsi un acteur a promis à un directeur de chanter sur son théâtre, ou, au contraire, de ne pas paraître sur une scène rivale; s'il refuse de tenir ses engagements, le créancier ne pourrait obtenir l'exécution

effective sans être autorisé à exercer sur la personne de son débiteur des violences physiques pour l'amener de force sur son théâtre, ou pour l'écarter du théâtre rival. Ces violences, cette contrainte physique dont les résultats ne pourraient être que fort imparfaits, sont contraires à l'esprit et au texte de toute notre législation, et c'est dans ces cas-là que l'obligation se résout nécessairement en dommages-intérêts.

"Un propriétaire a promis à son voisin d'abattre des abres qu'il a sur son propre terrain, et qui font obstacle à la vue de ce voisin. Si, se repentant de cette promesse, et disposé à faire de grands sacrifices d'argent pour conserver ses arbres, le débiteur refuse d'exécuter son obligation, le créancier pourra ne pas se contenter des dommages-intérêts ; il obtiendra l'autorisation d'entrer sur le fond de son débiteur, et de faire abattre les arbres.

"Pour les détails, voir le Répertoire de Dalloz, 33me volume, au mot *Obligation*, § 702 et suivant. Pothier, Traité des Obligations, N° 146 et suivant.

It is curious to observe the contrast presented by the English and French laws on this subject. The English is more careful of the observance of contracts: less anxious for the liberty of the subject. The French law is more careful of liberty ; less solicitous of the performance of obligation. The same jealousy for the liberty of the subject which limits the jurisdiction in France, was urged in the Common Law Courts against specific performance in chancery. (See *supra*, p. 8, § 20.)

E. F.

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